6837

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 49.

THE KENNEDY MINING AND MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

(18,060.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 575.

THE KENNEDY MINING AND MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said supreme court of the State of California, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in that certain suit between The Argonaut Mining Company, a corporation, defendant in error, and Kennedy Mining and Milling Co. (a corp.), plaintiff in error, being the suit numbered in your records as Sacramento, number 733, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of its being repugnant to the Constitution or laws of the United States and the decision was in favor of such its validity, or wherein was drawn in question the construction of a clause of the Constitution or of a statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, statute, or *or* commission, a manifest error hath happened, to the great damage of the said Kennedy Mining and Milling Company, as by its complaint and answer appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid *said* in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

1½ Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 15th day of March, 1901, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of January, in the year of our Lord one thousand nine hundred and one.

[Seal of U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

Allowed this 14th day of January, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I hereby certify that a copy of the foregoing writ of error was on the 14th day of January, 1901, lodged in the clerk's office of the

said supreme court of the State of California for the said defendant in error.

GEO. W. ROOT,
Clerk Clerk *of the Supreme Court of the State of California.*
By W. E. BOODY, *Deputy.*

1¾ [Endorsed:] (Copy.) Sac., 733. Kennedy Mining and Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Writ of error. Lodged copy.

2 In the Supreme Court of the State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff and Respondent,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant and Appellant.
No. 733. (Sacramento.)

Transcript on Appeal.

John M. Wright, Byron Waters, attorneys for appellant.
Lindley & Eickhoff, Wm. J. McGee, and F. J. Solinsky, attorneys for respondent.

Filed this 28th day of August, A. D. 1899.
GEO. W. ROOT, *Clerk,*
J. J. DUNCAN,
Deputy Clerk.

3 In the Supreme Court of the State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant.
No. —.

Transcript on appeal from the superior court of Calaveras county, California; complaint filed in Amador county (numbered 1408) and cause afterwards transferred to Calaveras county.

Complaint.

In the Superior Court of Amador County, State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant.

4 Complaint.

Plaintiff complains of defendant and alleges:

I.

That at all times mentioned in this complaint the plaintiff, Argonaut Mining Company, was and now is a corporation organized, ex-

isting and doing business under and by virtue of the laws of the State of California.

II.

That at all times mentioned in this complaint the defendant, Kennedy Mining and Milling Company, was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

III.

That at all times mentioned in this complaint the plaintiff has been and now is the owner and in the possession and entitled to the sole and exclusive possession of all that certain mine and mining claim situate, lying and being in Jackson mining district, Amador county, State of California, designated by the surveyor general of the State of California as lot No. forty-eight (48), embracing a portion of the northeast quarter of section twenty (20) in town-
5 ship six (6) north of range eleven (11) east Mt. Diablo meridian, which said mine and mining claim was and is commonly known as and called the Pioneer quartz mine, and is more particularly described as follows, to wit:

Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty-one (21) in township six (6) north of range eleven (11) east Mount Diablo meridian bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south eighty-nine (89) degrees thirty-six (36) minutes west, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode, seven (7) chains and eighty (80) links to post marked 46; thence north nineteen (19) degrees fourteen (14) minutes west, twenty-three (23) chains and seven (7) links to post marked 46, at the northwest corner of the claim from which post marked 37 situate at the southwest corner of the Kennedy Company's claim upon the Kennedy mine bears south seventy-four (74) degrees fifty-one (51) minutes west at the distance of thirty-two (32) links; thence from said post marked 46 north seventy-four (74) degrees fifty-one (51) minutes east along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46 the same being situate at the northern
6 end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from which a post marked 37 situate at the southeast corner of the said Kennedy Company's claim bears north seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty-two links. Thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east four (4) chains and three (3) links to post marked 46 situate at the southwest corner of the mill site belonging to said Pioneer quartz mine and adjoining the same on the east, twenty-four (24) chains and fifty (50) links to post marked 46. Thence south fifty-seven (57) links to place of beginning.

And plaintiff avers that at all of said times it was and now is the owner, in the possession of and entitled to the exclusive possession of 1,589.94 linear feet of that certain quartz vein or lode known as the Pioneer quartz vein or lode, which has its apex within the premises hereinbefore described, with the exclusive right to said 1,589.94 feet of said lode throughout its entire depth although it may enter the land adjoining; and said plaintiff at all of said times was and now is the owner of all other veins, lodes and ledges throughout their entire length and depth, the top- or apices of which
7 lie within or inside of the exterior lines of the Pioneer quartz mine described as aforesaid, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside of the vertical side lines of said described Pioneer quartz mine.

IV.

That defendant has sunk an incline shaft upon land adjacent to plaintiff's mining claim and since August 11th, 1894, and prior to the commencement of this action, said defendant by means of said shaft and of levels, drifts, cross-cuts and stopes, has penetrated into and upon the said lands and premises belonging to this plaintiff as hereinbefore alleged and into and upon the lodes, ledges and veins having their apices within the surface lines of said Pioneer quartz mine, and by means of said underground works has willfully, wrongfully and unlawfully and without the license or consent of said plaintiff worked and mined said lodes, ledges and mining ground and has taken out and extracted therefrom and converted to its own use large quantities of gold-bearing quartz of great value.

And plaintiff alleges upon its information and belief that said defendant since August 11, 1894, and prior to the commencement of this action has extracted over three thousand tons of ore and
8 gold-bearing quartz from the veins, lodes and ledges aforesaid, and has taken out, carried away and converted the same to its own use. That said ore was of great value, to wit: of the value of 135 thousand dollars. That by reason of the aforesaid acts of defendant plaintiff has been damaged in the sum of one hundred and thirty-five thousand dollars.

V.

Plaintiff further alleges that defendant threatens to continue said wrongful acts and threatens to continue to so mine and work the veins, ledges and lodes so belonging to this plaintiff as hereinbefore set forth and to extract, remove and convert to its own use the gold-bearing ore and quartz therein and will do so unless restrained by the order of this court.

Wherefore plaintiff prays judgment against defendant.

First. For the sum of one hundred thirty-five thousand dollars damages and for its cost of suit herein.

Second. That the defendant and its agents, servants and employees be enjoined from trespassing upon said plaintiff's said property or

upon any portion thereof pending this action and from in any
9 manner extracting ore or gold-bearing quartz therefrom or entering in or upon the lodes or ledges of plaintiff.

Third. That by the final judgment of this court defendant be perpetually restrained and enjoined from trespassing upon the lands, lodes and ledges of plaintiff.

Fourth. That plaintiff have such other, further and general relief as may be just.

LINDLEY & EICKHOFF,
W. J. McGEE,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, } ss:
County of Amador, }

W. F. Detert, being first duly sworn, deposes and says:

I am the president of The Argonaut Mining Company, the plaintiff named in the foregoing complaint. I have read said complaint and know the contents thereof. The same is true of my own knowledge except as to the matters therein stated upon information or belief and as to such matters I believe it to be true.

W. F. DETERT.

Subscribed and sworn to before me this 5th day of August, 1897.

[NOTARIAL SEAL.] THOMAS CANLON,
Notary Public, Amador County, Cala.

10 (Endorsement:) No. 1408. In superior court, county of Amador. Argonaut Mining Company (a corporation), plaintiff, *vs.* Kennedy Mining and Milling Company, defendant. Complaint. Filed August 5, 1897. C. L. Culbert, clerk. Lindley & Eickhoff, attorneys for plaintiff, 530 California street, San Francisco, Cal., rooms 39, 40, 41, and 42. Filed May 6, 1898. A. L. Wyllie, clerk.

Answer.

In the Superior Court of the County of Amador, State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

Answer.

Now comes the above-named defendant and answers the complaint filed by the above-named plaintiff in the above-entitled action.

Defendant admits that at all the times mentioned in the
11 said complaint the plaintiff Argonaut Mining Company has been and that it now is the owner, and in possession and entitled to the sole and exclusive possession of all that certain mine

and mining claim situate, lying and being in Jackson mining district, Amador county, State of California, designated by the United States surveyor general for the State of California as lot No. forty-eight (48) embracing a portion of the northeast quarter of section twenty (20) in township six (6) north of range eleven (11) east Mt. Diablo meridian, which said mine and mining claim was and is called the Pioneer quartz mine.

And defendant admits and alleges that the particular description of said Pioneer quartz mine, to wit, said lot No. forty-eight, and of the exterior boundaries thereof and of the place of beginning thereof, set forth in said complaint, is true and correct, that is to say, that said Pioneer quartz mine, to wit, said lot number 48, is particularly and correctly described as follows, to wit: Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty-one (21) in township six (6) north of range eleven (11) east Mount Diablo meridian bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south
12 eighty-nine (89) degrees thirty-six (36) minutes west, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode seven (7) chains and eighty (80) links to post marked 46; thence north nineteen (19) degrees fourteen (14) minutes west, twenty-three (23) chains and seven (7) links to post marked 46, at the northwest corner of the claim from which post marked 37 situate at the southwest corner of the Kennedy Company's claim upon the Kennedy mine bears south seventy-four (74) degrees fifty-one (51) minutes west at the distance of thirty-two (32) links; thence from said post marked 46 north seventy-four (74) degrees fifty-one (51) minutes east, along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46, the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from which a post marked 37 situate at the southeast corner of the said Kennedy Company's claim bears north seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty-two (32) links; thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the mill site belonging to said Pioneer
13 quartz mine and adjoining the same on the east, twenty-four (24) chains and fifty (50) links to post marked 46, thence south fifty-seven (57) links to place of beginning.

And defendant admits and alleges that the southern end of the lode, to wit, the Pioneer lode, named and described in said complaint, is truly and correctly described in said complaint as being situate south eighty-nine (89) degrees thirty-six (36) minutes west three (3) chains and eighty (80) links from the aforesaid place of beginning of said Pioneer quartz mine, to wit, said lot number 48, and defendant alleges that the aforesaid southern end of said lode is and at all times named in said complaint was the place of begin-

ning *of beginning* of all and singular the aforesaid ownership, claim, possession and right of possession of said Argonaut Mining Company of, in and to the said lode.

And defendant alleges that the Pioneer quartz vein or lode which is alleged in said complaint to have its apex within said Pioneer quartz mine, to wit, said lot No. 48, dips easterly and extends downward to an unknown depth into the earth at an average angle of about forty-five (45) degrees easterly from the vertical, and in its said course downward passes from and extends out of said lot number 48 easterly through and beyond the vertical east side line thereof, into ground lying easterly from said lot number 48 and from said east side line thereof.

14 And defendant admits and alleges that, as set forth in said complaint, the southern end line of said Pioneer quartz mine, to wit, said lot number 48, is the beginning and initial boundary thereof, and that the end lines of said Pioneer quartz mine, to wit, said lot number 48, are not parallel, but, on the contrary, that the northern end line thereof in its course from its west end easterly diverges substantially and at a very large angle toward the north from a direction parallel to said southern end line and initial boundary thereof, such divergence being to the extent of fourteen (14) degrees and forty-five (45) minutes northerly from a direction parallel to said southern end line and initial boundary, the course of said southern end line and initial boundary from its west end easterly being north eighty-nine (89) degrees thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees fifty-one (51) minutes east, and defendant alleges that such divergence between said end lines is easterly and toward and in the direction of the aforesaid dip and downward extension of said Pioneer quartz vein or lode.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times whatever was or now is the owner, in the possession of and entitled to the exclusive posses-

15 sion of, or was or now is the owner of, or was or now is in the possession of, or was or now is entitled to the exclusive or any possession of 1,589.94 linear feet or any other number of linear or other feet or any portion of said Pioneer quartz vein or lode throughout its entire depth or to or at any depth or place outside of the surface lines of Pioneer quartz mine, to wit, said lot number 48, extended downward vertically, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589.94 linear feet or any other number of linear or other feet or any part of said Pioneer quartz vein or lode, which extends or lies outside the vertical side lines of the surface location of said Pioneer mine, to wit, said lot number 48, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589.94 linear feet or any other number of linear or other feet or any part of said Pioneer vein or lode, which enters

or lies within the land or any land adjoining the Pioneer mine, to wit, said lot number 48.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times whatever, was or now is the owner of all other veins, lodes and ledges, or of any other
16 vein or veins, lode or lodes, ledge or ledges, the tops or apices of which lie within or inside of the exterior lines of said Pioneer quartz mine extended downward vertically, throughout their entire length and depth or throughout or to or at any length or depth or place whatever outside of the vertical side lines of said Pioneer quartz mine, and defendant denies that said plaintiff at any time or times whatever was or now is the owner or in any manner entitled to said or any vein or veins, or lode or lodes, or ledge or ledges, or any part of them, or any of them, which in their downward course so far depart from a perpendicular as to extend outside of the vertical side lines of said Pioneer quartz mine, and defendant denies that said plaintiff ever was or now is the owner of any part, parcel or portion of any lode, vein or ledge named in said complaint, extending or lying outside the vertical boundaries of said Pioneer quartz mine, to wit, said lot number 48, whether the top or apex of any such lode or vein or ledge lies within or without the vertical boundaries of said lot number 48.

And defendant denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, said defendant by means of the shaft named in said complaint and of levels, drifts, cross-cuts and stopes, or by means of any of
17 them, or by means of any shafts or shaft or levels or level or drifts or drift or cross-cuts or cross-cut or stopes or stope or by any other means or at all, has penetrated into or upon said or any lands or premises then or ever belonging to said plaintiff or upon the or any ledge or ledges, or lode or lodes or vein or veins having their apices within said Pioneer quartz mine, and defendant denies that at all or any of the times aforesaid or at any time or times whatever, defendant by means of said underground works or by means of any underground works or by any other means or at all, willfully, wrongfully and unlawfully and without the license or consent of said plaintiff or willfully or wrongfully or unlawfully or with or without the license or consent of said plaintiff, worked and mined or worked or mined said lodes, ledges, and mining ground or any of them or any lodes or lode or ledges or ledge or mining ground then or ever belonging to said plaintiff, and took out and extracted and converted to its own use or took out or extracted or converted to its own use or any use, therefrom or from any ground or premises then or ever belonging to said plaintiff, large or any quantities or quantity of gold-bearing quartz of great or any value.

And defendant denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, defendant extracted three thousand tons or any other number
18 of tons or any quantity of ore and gold-bearing quartz or three thousand or any other number of tons or any quantity of ore or gold-bearing quartz from the veins, lodes and ledges afore-

said or any of them or from any veins or vein, lodes or lode, ledges or ledge, then or ever belonging to said plaintiff, and took out, carried away and converted the same or any thereof to its own use or took out or carried away or converted the same or any thereof to its own or any use, and defendant denies that said ore was of the value of one hundred and thirty-five thousand dollars or of the value of any other sum or of any value at all, and defendant denies that said plaintiff was damaged by the acts of said defendant set forth in said complaint or by any acts or act of said defendant in the sum of one hundred and thirty-five thousand dollars or in any other sum or in any manner or at all.

And defendant denies that it did ever at any time by means of any shafts or shaft or of any levels or level, drifts or drift, cross-cuts or cross-cut, stopes or stope or by any means whatever or at all, penetrate into or upon any lands or land or premises or lodes or lode or ledges or ledge or veins or vein belonging in any manner to said plaintiff, and denies that by means of underground works or by any means or at all, said defendant willfully or wrongfully or unlawfully or without the license and consent of said plaintiff or at all, worked or mined any lodes or lode or ledges or ledge or mining ground belonging in any manner to said plaintiff, and denies that said defendant ever at any time took out or extracted therefrom or converted to its own or any use large or any quantities or quantity or ore, gold-bearing rock or quartz of great or any value, and denies that said defendant extracted therefrom three thousand tons or any quantity of ore or gold-bearing quartz or any ore or gold-bearing quartz whatever, and denies that said defendant ever took away or converted the same or any thereof to its own or any use or at all, and denies that said ore was of the value of one hundred and thirty-five thousand dollars or of any other sum or of any value and denies that said plaintiff was ever damaged by any acts or act of this defendant in the sum of one hundred and thirty-five thousand dollars or in any other sum or at all.

And defendant denies that it ever entered upon any premises of said plaintiff without its knowledge, license and consent first had and obtained.

And defendant denies that it ever entered upon or penetrated underground any lode or premises belonging to said plaintiff either with or without its consent.

And defendant denies that it ever worked or mined any lode or premises belonging to said plaintiff.

And defendant denies that it ever extracted or took out from any lode or premises belonging to said plaintiff, any ore or anything whatever.

And defendant denies that it ever took away or converted to its own or any use any gold-bearing quartz or any other thing belonging to said plaintiff.

And defendant denies that said plaintiff was ever damaged by any act or acts of defendant in any sum or value whatever.

And defendant denies that defendant threatens to continue the wrongful acts alleged in plaintiff's said complaint, and denies that

defendant threatens to continue or to do or perform any wrongful acts whatever, and denies that defendant threatens to mine and work the veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to mine and work or to mine or work any veins or vein or ledges or ledge or lodes or lode belonging to plaintiff, and denies that defendant threatens to extract, remove and convert to its own use the gold-bearing ore and quartz in said veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to extract or remove or convert to its own or any use the gold-bearing ore or quartz in said or any veins or vein or ledges or ledge or lodes or lode belonging to plaintiff.

21 Wherefore, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed, with judgment for its reasonable costs and charges in this behalf sustained.

JOHN M. WRIGHT,
Attorney for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

John Barton, being first duly sworn, deposes and says: That he is an officer, to wit, the president, of Kennedy Mining and Milling Company, the defendant named in the foregoing answer; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such matters that he believes it to be true.

JOHN BARTON.

Subscribed and sworn to before me this the 12th day of Feb'y, 1898.

[NOTARIAL SEAL.] JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsement:) No. 1408, original. State of California, county of Amador. In the superior court. Argonaut Mining Com-
22 pany (a corporation), plaintiff, *vs.* Kennedy Mining and Milling Company (a corporation), defendant. Answer. Service of the within by delivery of a copy thereof admitted this the 12th day of February, 1898. Lindley & Eickhoff, W. J. McGee, attorneys for plaintiff. John M. Wright, rooms 47 and 10, eighth floor, Mills building, San Francisco, attorney for defendant. Filed Feb. 14, 1898. C. L. Culbert, clerk, by B. R. Breese, deputy clerk. Filed May 6, 1898. A. L. Wyllie, clerk.

23 *Stipulation for Entry of Order Changing Place of Trial.*

In the Superior Court of Amador County, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

Stipulation for Entry of Order Changing Place of Trial.

It appearing that the judge of the superior court of Amador county is disqualified from acting in this cause, it is stipulated that an order may be made herein transferring said cause for trial to the superior court of Calaveras county, State of California.

24 Dated April 7, 1898.

LINDLEY & EICKHOFF,
W. J. McGEE,
Attorneys for Plaintiff.
JOHN M. WRIGHT,
Attorney for Defendant.

(Endorsed:) No. 1408. In superior court, county of Amador, State of California. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling —, defendant. Stipulation for entry of order changing place of trial. Filed April 13, 1898. C. L. Culbert, clerk. Lindley & Eickhoff, attorneys for —, 530 California street, San Francisco, Cal. Rooms 39, 40, 41, and 42. Filed May 6, 1898. A. L. Wyllie, clerk, by —— ——, deputy clerk.

25 *Order Transferring Cause to Calaveras County for Trial.*

In the Superior Court of Amador County, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

Order Transferring Cause.

Upon reading and filing the stipulation of the parties hereto, and it appearing that the judge of this court is disqualified from acting in this cause, it is ordered that this cause be transferred to the superior court of Calaveras county, State of California, for trial.

26 Dated April 13th, 1898.

R. C. RUST, *Judge.*

O. K.

LINDLEY & EICKHOFF,
W. J. McGEE,
Attorneys for Plaintiff.

O. K.

JOHN M. WRIGHT,
Attorney for Defendant.

(Endorsed:) No. 1408. In superior court, county of Amador, State of California. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling Company, defendant. Order transferring cause. Book 9, page 59. Filed April 13, 1898. C. L. Culbert, clerk. Lindley & Eickhoff, attorneys for plaintiff, 530 California street, San Francisco, Cal. Rooms 39, 40, 41 and 42. Filed May 6, 1898. A. L. Wyllie, clerk, by —— ——, deputy clerk.

27 *Decision.*

In the Superior Court of Calaveras County, State of California.

(Transferred from Amador County.)

ARGONAUT MINING COMPANY (a Corporation), Plaintiff, *vs.* KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant.	No. 1408. Formerly No. 1408 in the Superior Court of Amador County.

This cause came on regularly for trial on September 14th, 1898. Messrs. Lindley & Eickhoff, W. J. McGee and F. J. Solinsky appeared for plaintiff and Messrs. John M. Wright, Byron Waters and John J. Snyder appeared for defendant.

Thereupon said cause was submitted to the court for its decision upon an agreed statement of facts in writing, pursuant to a stipulation in writing signed in that behalf by the attorneys for the respective parties, which said agreed statement of facts and stipulation are now on file in said cause, and are as follows, to wit:

28 "*Agreed Statement of Facts and Stipulation Submitting Cause.*

"In the Superior Court of the County of Calaveras, State of California.

"ARGONAUT MINING COMPANY, Plaintiff, *vs.* "KENNEDY MINING AND MILLING COMPANY, Defendant.	No. —. Formerly No. 1408 in the Superior Court of Amador County.

"Agreed statement of facts and stipulation submitting cause.

"It is stipulated and agreed that for all the purposes of this action the following facts are true and for the purposes of the trial hereof they shall be deemed and taken as if proved by sufficient evidence, but the admission of such facts respectively as evidence in this cause shall be deemed and taken as duly objected to by the respective parties for want of relevancy and materiality to and competency to prove the issues presented by the pleadings, as fully for all purposes as though such objections were separately made and noted on the record in the customary legal manner.

"And it is further stipulated and agreed that the admission of each of such facts as evidence and such objections thereto shall be

ruled upon by the court at the time of the court's decision of the cause after final argument and submission.

29 "Each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the court the same as though made in open court or as though specifically set forth in this stipulation.

"And it is further stipulated and agreed that each of such rulings by the court upon the admission of such facts as evidence and upon such objections thereto, shall be deemed and taken as duly excepted to by the party against which such ruling shall be made, as fully for all purposes as though such exceptions were separately taken and noted on the record in the customary legal manner.

I.

"That the plaintiff in this action is and ever since June 14th, 1893, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

"That the defendant Kennedy Mining and Milling Company is and ever since December 22, 1886, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

30 III.

"That on and for more than twenty-five years prior to July 3rd, 1893, the Pioneer Gold and Silver Mining Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

IV.

"That at the time of its application for patent for the premises known as 'Kennedy mine' hereinafter described the Kennedy Mining Company was and for many years thenceforward continued to be a corporation organized and existing under the laws of the State of California.

V.

"On October 13, 1870, said Kennedy Mining Company filed its application for patent in the United States land office at Sacramento, California, wherein it applied for a patent to the property generally known as the 'Kennedy mine' now designated as lot number 44, forming a portion of sections 17 and 20 in township 6 north, of range eleven east, Mt. Diablo meridian.

"A diagram of the premises for which patent was so applied for was posted in the U. S. land office at Sacramento on October 15, 1870.

VI.

"On January 13th, 1871, the Pioneer Gold and Silver Mining Company, the immediate predecessor in title of this plaintiff, filed its application for patent in the United States land office at
31 Sacramento, California, wherein and whereby it applied for the issuance to it of a patent for the premises commonly known as and called the Pioneer quartz mine, now known as lot No. 48, embracing a portion of N. E. quarter of section 20, T. 6 N., R. 11 E., Mt. Diablo meridian, and a diagram of the ground so claimed and for which patent was sought was posted in the office of the register of said land office and upon said claim.

VII.

"That there was a surface conflict as to area claimed by said respective applicants for patent, as shown by the proceedings in said land office, said conflict occurring on the northern end of said Pioneer quartz mine as applied for, and the southern end of said Kennedy mine, as applied for.

"That thereupon, and on January 13th, 1871, the register and receiver of said land office made and entered the following order:

"'U. S. LAND OFFICE,
"'SACRAMENTO, CAL., *Jan. 13th*, 1871.

"'In the Matter of the Application for Patent and Adverse Claim of THE PIONEER GOLD AND SILVER MINING COMPANY, a Corporation,

vs.

"'THE KENNEDY MINING COMPANY, a Corporation, Applicant under Acts of Congress of July 26th, 1866, and July 9th, 1870.

"'Now, on this day, upon a careful examination of the foregoing testimony and the application and records of said application and adverse claim herein filed, we find that said adverse claim
32 is such a one as is contemplated by the 6th section of the act herein provided and the regulations of the General Land Office; and that said adverse claimant is entitled to a search and be heard relative thereto in the local courts.

"'It is therefore hereby ordered that the proceedings in the case of Kennedy Mining Company, applicant for a patent be and the same are hereby suspended so far as the same affects the following-described piece or parcel of land, commencing at the northern boundary of said Pioneer Gold and Silver Mining Company's claim and running thence southerly on said vein or lode, and surface ground of said Pioneer Company 153.78 feet, which portion thereof is claimed by the Kennedy Mining Company, a corporation; said land being in the N. E. ¼ of section 20, township 6 north, range 11 east, Mount Diablo base and meridian, until an adjustment can be

had of said adverse claim in the local courts having jurisdiction thereof as required by said acts and regulations herein provided.

"'JOHN G. McCALLUM, *Register.*
"'HART FELLOWS, *Receiver.*'"

VIII.

"That thereafter, and on February 20th, 1871, the said respective applicants for patent, to wit, the Pioneer Gold and Silver Mining Company, and the Kennedy Mining Company, made and entered into an agreement in writing which was filed in the office of said register and receiver at Sacramento, and forms a part of the record of each of said applications for patent.

"Said agreement is in words and figures following, to wit:

33 "'In the Matter of the Applications Respectively of THE PIONEER GOLD AND SILVER MINING COMPANY and THE KENNEDY MINING COMPANY for Patents to Quartz Mining Claims.

"'Whereas, the above-named corporations have respectively filed applications in the United States land office at Sacramento, for patents, to quartz mining claims in Amador county, California, from which it appears that there is a conflict of claim to a portion thereof.

"'And, whereas, the said corporations have mutually adjusted, settled and compromised such conflict of claims.

"'Now, therefore, in consideration thereof these presents witnesseth: That the Pioneer Gold and Silver Mining Company withdraws from its application as aforesaid any claim to the northern portion of the quartz lode or lead and surface ground therein described and embracing forty feet and six inches, to wit: Beginning at the live-oak tree, the point of commencement mentioned in said application, and extending thence south, the aforesaid forty feet and six inches. And the Kennedy Company abandons all claim to any portion of the said quartz lode or lead and surface ground, south of the point where such extent of forty feet and six inches shall terminate.

"'And the dividing line between the claims of the respective companies shall be one drawn at right angles with the general course of the lode or lead, and surface grounnd thereto appurtenant, and at the point hereinbefore designated, to wit: where such extent of forty feet and six inches shall terminate.

34 "'Witness, the private seal of the Pioneer Gold and Silver Mining Company (no corporate seal having yet been provided for that company) and the corporate seal of the Kennedy Mining

Company with the signatures of the officers of each company respectively hereunto set this 20th day of February, A. D. 1871.

"'THE PIONEER GOLD AND SILVER MINING COMPANY. [SEAL].
"'LOUIS MENTZEL, *President*,
"'G. WELLER, *Secretary*,
"'F. HOFFMAN AND
"'GEORGE STOESSEL,
"' *Trustees Pioneer Gold and Silver Mining Company*,
"'By LOUIS MENTZEL.
"'SAMUEL W. BRIGHT,
"' *President Kennedy Mining Company.*
"'P. REICHLING,
"'J. MEEHAN, *Trustees.*
[L. S.] "'C. H. TURNER,
"' *Secretary Kennedy Mining Company.*'

IX.

"That on the 15th day of March, 1871, the surveyor general of the United States for the State of California issued his instructions to William L. McKim, United States deputy mineral surveyor, to make survey for patent of said Kennedy quartz mine.

X.

"That in pursuance of said instructions said William McKim during the months of April and May, 1871, made and completed such survey and thereupon made a return of such survey to the United States surveyor general's office, and on the 19th day
35 of October, 1871, said surveyor general approved said survey as so returned and thereafter and on the 11th day of November, 1871, said Kennedy Mining Company entered and paid for said mining claim so surveyed by said McKim and the receiver of the said United States land office thereupon issued his duplicate receipt evidencing such entry and payment.

XI.

"That, thereafter, to wit, on the 29th day of July, 1872, the Government of the United States issued to said Kennedy Mining Company its certain letters patent of which the following is a copy:

"'General Land Office No., 393; mineral certificate No. 38.

"'The United States of America to all to whom these presents shall come, Greeting:

"'Whereas, in pursuance of the act of Congress approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof approved July 9th, 1870; and the act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the

development of the mining resources of the United States," there have been deposited in the General Land Office of the United States, the plat and field-notes of survey of the claims of the Kennedy Mining Company, upon the Kennedy quartz mine, bearing gold, accompa-
36 nied by the certificate of the register of the land office of Sacramento in the State of California, whereby it appears that in pursuance of said acts of Congress the Kennedy Mining Company did, on the eleventh day of November, A. D. 1871, enter and pay for said mining claim or premises, being mineral entry No. 38, in the series of said office, designated by the surveyor general as lot number forty-four (44) forming a portion of sections seventeen (17) twenty (20) in township six (6) north of range eleven (11) east, Mount Diablo meredian in the Jackson mining district in the county of Amador, and State of California in the district of lands subject to sale at Sacramento embracing twenty-seven and eighty-five-hundredths (27.85) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation as hereinafter stated, east to wit:

"'Beginning for the description of that portion of the lode hereby conveyed at a post marked 37, from which the northeast corner of section twenty (20) in township six (6) north of range eleven (11) east, Mount Diablo meridian, bears north seventy-four (74) degrees twenty-six (26) minutes east, with magnetic variation at seventeen (17) degrees east at the distance of thirty-one (31) chains and seventy-three (73) links; thence from said post south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eight (8) chains and sixty-two (62) links to post marked 37 situate at southern boundary of the Kennedy quartz mine and from said post first hereinbefore described north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east four (4) chains and thirteen (13)
37 links to oak post marked 37, from which the northeast corner of said section twenty (20) bears north eighty-one (81) degrees thirty-six (36) minutes east at the distance of thirty (30) chains thirty-one (31) links; thence from said oak post north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, two (2) chains to Ione and Jackson road three (3) chains and fifty-five (55) links to ravine, seventeen (17) chains and seventy-seven (77) links to post marked 37 situate on the north boundary of claim.

"'Beginning for the description of the surface ground hereby conveyed at post marked 37 situate at the northwest corner of the claim. Thence north seventy-three (73) degrees thirty-nine (39) minutes east with magnetic variation at sixteen (16) degrees thirty-seven (37) minutes east seven (7) chains and fifty-eight (58) links to post marked 37; thence south fifteen (15) degrees eighteen (18) minutes east with magnetic variation at seventeen (17) degrees east, eighteen (18) chains and fifty-five (55) links to post marked 37; thence south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eleven (11) chains and ninety-one links

to post marked 37; thence south seventy-four (74) degrees fifty-one (51) minutes west with magnetic variation at seventeen (17) degrees east, eight (8) chains and twenty-four (24) links to post marked 37; thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, thirteen (13) chains and fifty-nine links to post marked 37; thence north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, sixteen (16) chains and ninety-nine (99) links to the place of beginning.

38 "'Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at post marked 37, situate at the southeast corner of the land survey hereinbefore described; thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, eight (8) chains to lone and Jackson road eleven (11) chains and ninety-one (91) links to post marked 37; thence north fifteen (15) degrees eighteen (18) minutes west seventy-eight (78) links to a post; thence north seventy-four (74) degrees forty-two (42) minutes east two (2) chains to a post; thence south thirteen (13) degrees forty-two (42) minutes east eleven (11) chains and seventy-three (73) links to a post; thence south seventy-four (74) degrees fifty-one (51) minutes west six *six* (6) chains and forty-one (41) links to the place of beginning.

"'The aggregate area hereby conveyed being twenty-seven (27) acres and eighty-five-hundredths ($\frac{85}{100}$) of an acre of land, more or less, as represented by yellow shading in the following plat.

(Here follows plat.)

"'Now know ye: that the United States of America, in consideration of the premises, and in conformity with said acts of Congress, have given and granted, and by these presents do give and grant unto the said Kennedy Mining Company and to their successors and assigns, the said mining premises hereinbefore described as lot number forty-four (44) forming a portion of sections seventeen and twenty in township six (6) north of range eleven east Mt. Diablo mer. with

39 the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of two thousand and fourteen and thirty-hundredths linear feet of the said Kennedy quartz mine, vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining and of all veins, lodes, ledges or deposits, throughout their depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey:

"'Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect

such exterior parts of said veins, lodes, ledges or deposits; and provided further that nothing in this conveyance shall authorize the grantees herein, their successors or assigns, to enter upon the surface of a mining claim owned or possessed by another:

"'To have and to hold said mining premises together with the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said Kennedy Mining Company and to their successors and assigns forever, subject, nevertheless, to the following conditions and stipulations:

"'First. That the grant hereby made is restricted to the land hereinbefore described as lot number forty-four with two thou-
40 sand and fourteen and $\frac{3}{10}$ linear feet of the Kennedy quartz mine, vein, lode, ledge or deposit, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid the tops or apexes of which lie inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of *of* May, eighteen hundred and seventy-two.

"'Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode ledge or deposit.

"'Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and right to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

"'Fourth. That in the absence of necessary legislation by Congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

"'In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

41 "'Given under my hand at the city of Washington, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States, the ninety-seventh.

"'By the President:

"'U. S. GRANT.

"'By Z. B. STURGUS,

"'*Ass't Secretary.*

"'[Seal of U. S. Gen. Land Office.]

"'C. B. BOYNTON,

"'*Recorder of the General Land Office.*

"'Recorded vol. 4, pages 293 to 300.

"'Examined.'

XII.

"That thereafter, to wit, on the 28th day of December, 1886, said Kennedy Mining Company conveyed to said Kennedy Mining and Milling Company all the property and rights conveyed to it the said Kennedy Mining Company, by means of said letters patent and the only title claimed or asserted by said Kennedy Mining Company in and to said Kennedy mine is such as is established by the said United States patent.

XIII.

"That on the 16th day of June, 1871, the United States surveyor general for the State of California, issued his instructions to said William L. McKim to make survey for patent for said Pioneer quartz mine.

XIV.

"That in pursuance of said instructions, said William L. McKim on September 1st, 1871, completed his survey for patent of said Pioneer quartz mine, and thereupon returned said survey to
42 the United States surveyor general's office, and on the 21st day of December, 1871, said surveyor general approved said survey.

"That said return of survey of said Pioneer quartz mine as so approved by said surveyor general was and is in the words and figures following, to wit:

"'*Field-notes*

of the survey of that certain gold-bearing quartz vein or lode of gold-bearing quartz rock known as the

"'Pioneer mine

in the Jackson mining district, and numbered 48, section 20, township 6 north, range 11 east Mount Diablo meridian, in the county of Amador, State of California, by William L. McKim, United States deputy mineral surveyor, in pursuance with special instructions from J. R. Hardenbergh, U. S. surveyor general for California, bearing date the 10th day of June A. D. 1871.

"'Survey commenced, August 31, 1871.

"'Survey completed, September 1, 1871.

"'Field-notes

of the line along the vein or lode are as follows, viz:

"'Beginning at a post marked 46 standing at the southern boundary of said line, from which the ¼ section post between sections 20 and 21, township 6 north, range 11 east of Mount Diablo meridian bears

"'Chains.	N. 89° 36′ E.	Variation 17° E.
"' 23.91		distant; a white oak, 30 in. dia. bears N. 86° 44′ W. 0.40 chs. dist. A black live-oak stump (and second growth) 30 in. diam. bears S. 78° 44′ E. 1.34 chs. dist.
43		
"'		Thence
"'	N. 19° 14′ W.	along said line of vein
"'Chains.		Variation 17° E.
"' 2.14		An open cut on the west of the line.
"' 2.68		An open cut on the east of the line.
"' 9.00		An open cut on the east of the line.
"' 19.34		A shaft 60 feet deep.
"' 22.99		A shaft 20 feet deep.
"' 23.09		South end of open cut on the vein.
"' 24.09		North end of open cut and post marked 37 and 46, and common to the southern boundary of the center line of the Kennedy quartz mine, and northern boundary of the center line of the Pioneer quartz mine, from which a pine, 8 in. dia. bears N. 2° 20′ E. 0.47 chs. dist., a pine 6 in. diam. bears S. 63° 54′ E. 0.91 chs. dist.

"'Field-notes

of the exterior boundaries of the land claimed with the Pioneer mine are as follows, to wit:

"'Beginning at a post marked 46, from which the ¼ section post on the line between sections 20 and 21 bears

"'Chains.	N. 89° 36′ E.	Variation 17° E.
44		
"' 20.11		distant; thence
"'	S. 89° 36′ W.	Variation 17° E.
"' 3.80		A post marked 46 and southern boundary of the center line of said vein or lode.
"' 7.80		Set a post marked 46 and S. W. corner of the land claimed with said
"'	N. 19° 14′ W.	mine. Thence along the western boundary of said land.

"			Variation 17° E.
"	23.67		Set a post marked 46 and N. W. corner of the land claimed with the Pioneer quartz mine, from which a post marked 37 at the S. W. corner of the land claimed with the Ken-
"		S. 74° 51′ W.	nedy mine bears, 32 links distant.
"		N. 74° 51′ E.	Thence, along the southern boundary of the land claimed with the Ken-
"	3.80		nedy mine, a post marked 37 and 46 and common to the southern boundary of the center line of the vein or lode of the Kennedy mine and northern boundary of the center line of the vein or lode of the pioneer mine.
"	7.60		Set a post marked 46 at the N. E. corner of the land claimed with the
45			Pioneer mine, from which a post marked 37 at the S. E. corner of the
" Chains.			land claimed with the Kennedy
"		N. 74° 51′ E.	mine, bears 32 links distant. Thence,
"		S. 19° 14′ E.	along the eastern line of said claim,
			Variation 17° E.
"	3.50		Entrance of tunnel on the east
"	4.03		end of line. Set a post marked 46 for S. W. corner of land claimed as a mill site.
"	4.25		Entrance of tunnel on the west of line.
"	24.50		Set a post marked 46.
"			Thence
"		South	Variation 17° E.
"	0.57		to place of beginning, containing 18.23 acres.

" Field-notes

of the exterior boundaries of the land claimed with the Pioneer mine as a mill site.

" Beginning at a post marked 46 and N. E. corner of the land claimed with the Pioneer mine. Thence,

" Chains.	N. 74° 51′ E.	along the southern boundary of the lands of the Kennedy mine and mill site.
"		Variation 17° E.
" 0.32		A post marked 37 and S. E. corner of the land claimed with the Ken-

46 nedy mine and S. W. corner of land claimed as a mill site.

"'Chains.
"' 6.73 A post marked K. M. S. and S. E. corner of land claimed with the Kennedy mine as a mill site.
"' Thence
"' S. 37° 38′ E. Variation 17° E.
"' 7.05 Set a post for S. E. corner. Thence
"' S. 89° 36′ W. Variation 17° E.
"' 9.55 A post marked 46 at the intersection of the east line of the land claimed with the Pioneer mine. Thence
"' N. 19° 14′ W. Along the eastern boundary of the land claimed with said mine.
"' Variation 17° E.
"' 4.03 to the place of beginning, containing
" 3.99 acres.

"'*Report.*

"'U. S. DEPUTY SURVEYOR'S OFFICE,
"'JACKSON, *Nov'r* 14, 1871.

"'Hon. J. R. Hardenbergh, U. S. surveyor general for California.

"'SIR: In compliance with instructions from your office, bearing date June 16th, 1871, I herewith submit the following report and return of the improvements and character of the same; in and upon that certain gold-bearing quartz vein or lode of gold-bearing quartz rock, known as the Pioneer mine, situate in Jackson mining
47 district, section 20, township 6 north, range 11 east, Mount Diablo meridian, county of Amador, State of California:

"'Total value of labor and improvements.

"'From the affidavits of S. W. Bright, C. Weller and Frank Hoffman, herewith exhibited and marked respectively, Exhibits "C," "D" and "E," and made a part of this return and report.

"'The least amount set forth in said affidavits as the value of labor and improvements in and upon said Pioneer mine, is seven thousand dollars.

"'Character of improvements.

"'1st. One timbered tunnel 684 feet in length.
"'One tunnel 100 feet in length.
"'One tunnel 60 feet in length.
"'2nd. One shaft 4 x 6 feet, 75 feet in depth.
"'One shaft 4 x 6 feet, 75 feet in depth.
"'3d. Several open cuts and prospect holes.

"'There is no mill attached to the mine.

"'The general dip of the vein is about 45° and dips to the east.

"'The elevation of the mine above the sea is about 1,300 feet, and it is situated on the main road from Jackson to Sutter.

"'Very respectfully, your ob't serv't,

"'WILLIAM L. McKIM,

"'*U. S. Mineral Surveyor for Amador Co., Cala.*

List of Names.

"'A list of the names of the individuals employed to assist in running, measuring, or marking the lines and corners described in the foregoing field-notes of the final survey of that certain
48 mining claim known as the Pioneer mine No. 46, a gold-bearing quartz vein or lode of gold-bearing quartz rock in the Jackson mining district, section 20, T. 6 N., R. 11 E. of Mt. Diablo meridian, Amador Co., Cala., showing the respective capacities in which they acted.

"'William L. McKim, U. S. dept. surveyor, compassman.

"'D. D. Reaves, chainman.

"'James F. Purslowe, chainman.

"'—— ——, axeman.

Final Oaths of Assistants.

"'We hereby certify that we assisted William L. McKim, U. S. mineral deputy surveyor, in surveying that certain gold-bearing quartz vein or lode of gold-bearing quartz rock, known as the Pioneer mine in Jackson mining district, No. 46 township 6 north range 11 east of Mt. Diablo meridian, and that said survey has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the surveyor general.

"'D. D. REAVES.

"'JAMES F. PURSLOWE.

"'Subscribed and sworn to before me this 1st day of September, 1871.

"'WILLIAM L. McKIM,

"'*U. S. Deputy Surveyor.*

Final Oath of Deputy Surveyor.

"'I, William L. McKim, U. S. mineral deputy surveyor, do solemnly swear that in pursuance with instructions from J. R.
49 Hardenbergh, United States surveyor general for California, bearing date the 16th day of June, A. D. 1871, I have well, faithfully and truly, in my own proper person, and in strict conformity with the instructions furnished by the surveyor general, the surveying manual, and the laws of the United States, surveyed all those parts or portions of that certain mining claim, known as the

Pioneer mine, a gold-bearing quartz vein or lode of gold-bearing quartz rock, situate in the Jackson mining district, section 20, township 6 north, range 11 east of Mount Diablo meridian, county of Amador, State of California, as are represented in the foregoing field-notes as having been surveyed under my direction; and I do further solemnly swear that all the corners of said surveys have been established and perpetuated in strict accordance with the surveying manual and printed instructions, and that the foregoing are the true and original field-notes of such survey.

"'WILLIAM L. McKIM,
"'*U. S. Deputy Surveyor.*

"'Subscribed and sworn to before me, this 4th day of December, 1871.

"'R. M. BRIGGS,
"'*United States Commissioner for Amador County, California.*'

XV.

"That thereafter and on the 23rd day of February, 1872, the said Pioneer Gold and Silver Mining Company entered and paid for said mining claim as so surveyed by said William L. McKim, and the receiver of said United States land office thereupon issued his duplicate receipt evidencing such entry and payment.

50 XVI.

"That thereafter, to wit, on the 12th day of August, 1872, the Government of the United States issued to said Pioneer Gold and Silver Mining Company its certain letters patent of which the following is a copy:

"'General Land Office No., 406; mineral certificate No. 63.

"'The United States of America to all to whom these presents shall come, Greeting:

"'Whereas, in pursuance of the act of Congress approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof, approved July ninth, eighteen hundred and seventy; and the act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States" there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of the Pioneer Gold and Silver Mining Company upon the Pioneer quartz lode bearing gold, accompanied by the certificate of the register of the land office at Sacramento, in the State of California, whereby it appears that in pursuance of said acts of Congress, the Pioneer Gold and Silver Mining Company did, on the 23rd day of February, A. D. 1872, enter and pay for said mining claim or premises,

being mineral entry No. 63, in the series of said office,
51 designated by the surveyor general as lot number forty-eight (48) embracing a portion of the northeast quarter of section twenty (20) in township six north of range eleven east Mt. Diablo meridian in the Jackson mining district, in the county of Amador and State of California, in the district of lands subject to sale at Sacramento, embracing twenty-two and twenty-two-hundredths (22.22) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation at seventeen (17) degrees east, to wit:

"'Beginning for the description of said land claimed with said lode at a post marked 46, from which the quarter-section corner between sections twenty (20) and twenty-one (21) in township six (6) north of range eleven (11) east, Mount Diablo meridian, bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south eighty-nine (89) degrees thirty-six (36) minutes west three (3) chains and eighty (80) links to post marked 46 at southern end of said lode, seven (7) chains and eighty (80) links to post marked 46; thence north nineteen (19) degrees fourteen (14) minutes west twenty-three (23) chains and seven (7) links to post marked 46 at the northwest corner of the claim, from which post marked 37 situate at the southwest corner of the Kennedy Company's claim, upon the Kennedy mine bears south seventy-four (74) — fifty-one (51) minutes west at the distance of thirty-two (32) links; thence from said post marked 46 north seventy-four (74) degrees fifty-one (51) minutes east along the southern boundary of
52 the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46—the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim, seven (7) chains and sixty (60) links to post marked 46, from which a post marked 37 situate at the southeast corner of the said Kennedy Company's claim bears north seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty-two (32) links; thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east, four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the mill site hereby conveyed, twenty-four (24) chains and fifty (50) links to post marked 46; thence south fifty-seven (57) links to the place of beginning, containing eighteen (18) acres and twenty-three-hundredths $(\frac{23}{100})$ of an acre of land, more or less.

"'Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at a post marked 46, situate at the northeast corner of the land hereinbefore described; thence north seventy-four (74) degrees fifty-one (51) minutes east along the southern boundary of the Kennedy Company's mill site thirty-two (32) links to a post marked 37 situate at the southwest corner of said Kennedy Company's mill site, six (6) chains and seventy-three (73) links to a post marked K. M. S. situate at southeast corner of said

Kennedy Company's mill site; thence south thirty-seven (37) degrees thirty-eight (38) minutes east seven (7) chains and five (5) links to post; thence south eighty-nine (89) degrees thirty-six (36) minutes west nine (9) chains and fifty-five (55) links to post
53 marked 46 hereinbefore described as situate at the southwest corner of said mill site; thence north nineteen (19) degrees fourteen (14) minutes west four (4) chains and three (3) links to the place of beginning, containing three (3) acres and ninety-nine-hundredths ($\frac{99}{100}$) of an acre of land, more or less, which together with the land claimed with said lode, aggregates twenty-two (22) acres and twenty-two-hundredths ($\frac{22}{100}$) of an acre of land, more or less, as represented by yellow shading in the following plat:

(Here follows plat.)

"'Now know ye, that the United States of America in consideration of the premises and in conformity with the said acts of Congress, have given and granted, and by these presents do give and grant, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns the said mining premises hereinbefore described as lot number forty-eight (48) embracing a portion of the northeast quarter of section twenty (20) in township six (6) north of range eleven (11) east Mt. Diablo meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred and eighty-nine and $\frac{94}{100}$ linear feet of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining, and of all the veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins,
54 lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey;

"'Provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits.

"'And provided further, that nothing in this conveyance shall authorize the grantees herein, their successors or assigns to enter upon the surface of a mining claim owned or possessed by another;

"'To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns forever, subject nevertheless, to the following conditions and stipulations:

"'First. That the grant hereby made is restricted to the land hereinbefore described as lot number forty-eight (48) with fifteen

hundred and eighty-nine and $\frac{94}{100}$ linear feet of the Pioneer quartz vein, lode, ledge or deposit throughout its entire depth as aforesaid together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie
55 inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of May eighteen hundred and seventy-two.

"'Second. That the premises hereby conveyed with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

"'Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

"'Fourth. That in the absence of necessary legislation by Congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

"'In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"'Given under my hand at the city of Washington the twelfth day of August in the year of our Lord one thousand eight
56 hundred and seventy-two and of the Independence of the United States the ninety-seventh.

"'By the President:

"'U. S. GRANT.

"'By Z. B. STURGESS,

"'*Ass't Secretary.*

"'[SEAL.]

C. B. BOYNTON,

"'*Recorder of the General Land Office.*

"'Recorded, vol. 4, pages 393 to 401.'

XVII.

"That attached to said several patents was a plat delineating the boundaries and surface lines described in said patents respectively. Said plat attached to said patent to said Kennedy Mining Company delineates the surface ground as the same is marked and designated on 'Exhibit A,' annexed hereto as lot forty-four (44) Kennedy quartz mine; and the plat annexed to said patent to said Pioneer Gold and Silver Mining Company delineates the surface ground described in said last-named patent as shown upon 'Exhibit A' annexed hereto, marked lot forty-eight (48) Pioneer quartz mine.

XVIII.

"That the line A—B marked upon the diagram 'Exhibit A' is the northern end line of said Pioneer quartz mine as patented, and to the extent of the length of said line, to wit: seven (7) chains and sixty (60) links, is coincident with the southern end line of said Kennedy quartz mine as described in said patent to said Kennedy Mining Company.

"The course of said line A—B is north seventy-four (74) degrees fifty-one (51) minutes east. The dotted line B—B' is said line A—B produced indefinitely in its own direction.

57

XIX.

"That said Argonaut Mining Company has sunk an incline shaft which has its collar or top in the Pioneer mill site described in said patent to said Pioneer Gold and Silver Mining Company at a point marked 'B' on said diagram 'Exhibit A,' and descends into the earth downward from its collar easterly at an average angle approximately sixty-two degrees from the plane of the horizon.

XX.

"Traversing said Kennedy and Pioneer mines in a general northerly and southerly direction is a ledge of rock in place bearing gold. It is a well-defined vein varying in width from three inches to thirty feet lying between well-defined walls, and dips and descends into the earth easterly at an average angle of approximately forty degrees from the plane of the horizon until it reaches a point in said Argonaut shaft about four hundred and forty feet below the collar or top thereof below which point said vein dips and descends into the earth easterly at an average angle of approximately sixty-three degrees from the plane of the horizon, the general easterly direction of said dip of said vein being indicated by the arrows on 'Exhibit A.'

XXI.

"The general course of said vein is S. 19° 14′ E or N. 19° 14′ W. as is apparent on the surface by the outcrop visible in said Pioneer mine lot 48. Said vein in its course southerly passes out of
58 said Kennedy quartz mine crossing said line A—B at a point thereon marked 'Z' on said 'Exhibit A,' and enters the Pioneer ground, thence pursuing its general southerly course towards the southern end line of said Pioneer quartz mine, which it crosses.

XXII.

"Within the surface boundary of the tract designated on 'Exhibit A' as the Kennedy mill site, and at the point marked 'X' on 'Exhibit A' the Kennedy Mining and Milling Company have sunk a shaft, which is vertical or nearly so to the depth of three hundred and seventy-six feet, or thereabouts, at which depth it encounters the vein or ledge above described, as it descends into the earth from the overlying apex or outcrop.

"Thence said shaft is an incline following the vein on its dip or downward course into the earth to a present depth of approximately two thousand two hundred and fifty feet.

XXIII.

"From said shaft the defendant herein has extended certain levels and drifts southerly on said vein, some of which are shown in horizontal projection on the diagram marked 'Exhibit A' hereto annexed and marked respectively 1450, 1550, 1650 and 1750 levels. Some of these levels have been by said defendant extended on said vein southerly and beyond a vertical plane drawn through the line A—B produced in the direction of B′.

"That between the 8th day of October, 1895, and the 12th day of December, 1895, the defendant extracted, removed and con-
59 verted to its own use two thousand six hundred and four (2,604) tons of gold-bearing ore from said vein southerly from and beyond said vertical plane, but within the vertical boundaries of the Silva quartz mine delineated on said Exhibit A, and hereinafter described.

"That the gross value of said 2,604 tons of said ore so extracted, removed and converted by defendant was the sum of sixty-two thousand two hundred and eighteen $\frac{45}{100}$ (62,218.45) dollars.

"That the aggregate cost of mining and milling said ore was the sum of six thousand one hundred and nineteen $\frac{40}{100}$ (6,119.40) dollars, which amount plaintiff consents may be deducted from the gross value of the ore as above stated, in the event the court should determine that plaintiff is entitled to recover in this action.

"The net profit realized by said defendant from said ore was the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold.

XXIV.

"That the vein exposed in defendant's underground workings south of the vertical plane drawn through the line A—B produced in the direction B′ is the same vein which has its top or apex in the Kennedy quartz mine and in the Pioneer quartz mine, and that such vein is continuous from the top or apex in both properties downward to the lowest depths, and that said vein at all points below the surface continues on its course in a general southerly direction indefinitely towards the south end line of the Pioneer quartz mine, which it crosses, and that the aforesaid 2,604 tons of ore were extracted by defendant from said vein south of said vertical plane drawn through the line A—B—B′.

60 XXV.

"Said vein is the identical vein mentioned in the Kennedy patent as the Kennedy vein or lode and in the Pioneer patent as the Pioneer vein or lode.

XXVI.

"That plaintiff became the owner of said Pioneer quartz mine by deed duly executed July 3, 1893, by the Pioneer Gold and Silver

Mining Company, the patentee named in the Pioneer patent hereinbefore described, and has ever since been and now is such owner.

XXVII.

"That the defendant became the owner of said Kennedy mine by mesne conveyances from the patentee by deed dated December 28th, 1886, and has ever since and now is such owner.

XXVIII.

"Delineated upon said diagram hereto annexed marked 'Exhibit A' is a property known as the Silva quartz mine, lot No. 86. The surface of said Silva quartz mine overlies so much of the dip of said Pioneer and Kennedy vein as may be found between vertical planes drawn downward through the boundaries of said Silva quartz mine. That the defendant is and ever since the sixth day of February, 1893, has been the owner of said Silva quartz mine by virtue of a quartz mining patent issued to it on that day under the
61 mining laws of Congress which patent is in the words and figures as follows, to wit:

"'General Land Office No., 22540; mineral certificate No. 1521.

"'The United States of America to all to whom these presents shall come, Greeting:

"'Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 1521, of the register of the land office at Sacramento, in the State of California, accompanied by other evidence, whereby it appears that the Kennedy Mining and Milling Company did, on the thirteenth day of October A. D. 1892, duly enter and pay for that certain mining claim or premises known as the Silva quartz lode mining claim, designated by the surveyor general as lot No. 86, embracing a portion of section twenty, in township six, north of range eleven east, Mt. Diablo meridian, in the Jackson mining district, in the county of Amador and State of California in the district of lands subject to sale at Sacramento and bounded, described and platted as follows, with magnetic variation as hereinafter stated.

"'Beginning at an iron post situate at the northeast corner of lot No. 61, the Volunteer quartz lode claim.

"'Thence, first course, magnetic variation sixteen degrees and thirty-five minutes east, north sixty degrees and thirty-one minutes east, thirty-five feet to a post marked "X."

62 "'Thence, second course, magnetic variation sixteen degrees and thirty-five minutes east, south thirty-five degrees and ten minutes east one hundred and sixty-seven feet to a post marked "IX."

"'Thence, third course, magnetic variation sixteen degrees and thirty-five minutes east, north eighty-nine degrees and forty-five minutes east one hundred and three feet to a post marked "VIII,"

from which a shaft bears south sixty-four degrees and twenty minutes east one hundred and twenty-six feet distant; and a shaft bears north fifty-six degrees and ten minutes east three chains and thirty-four links distant.

"'Thence, fourth course, magnetic variation, sixteen degrees, and twenty-five minutes east, north twenty-four minutes west four hundred and seventy feet to a post marked "VII."

"'Thence, fifth course, magnetic variation fifteen degrees and fifty-five minutes east, north eighty-nine degrees and twenty minutes east two hundred and thirteen and two-tenths feet to a post five inches square marked "V," in mound of stone, from which a blazed live oak five inches in diameter bears north fifty degrees and fifteen minutes east forty-three and one-half links distant; and the corner common to sections sixteen, seventeen, twenty and twenty-one, in township six north of range eleven east, Mount Diablo meridian bears north eighty-nine degrees and twenty minutes east ten chains distant.

"'Thence, sixth course, magnetic variation fifteen degrees and thirty-nine minutes east, south ten minutes east, one thousand three hundred and six and eight-tenths feet to a post marked "IV," being the southeast corner of claim.

63 "'Thence, seventh course, magnetic variation sixteen degrees and twenty-five minutes east, south eighty-nine degrees and twenty minutes west, six and six-tenths feet to an iron bar two inches in diameter, projecting three inches above ground, situate in a gateway.

"'Thence, eighth course, magnetic variation sixteen degrees and twenty-five minutes east, north thirty-one degrees and forty-eight minutes west, six hundred and sixty-three and three-tenths feet to a post marked "II."

"'Thence, ninth course, magnetic variation sixteen degrees and thirty-five minutes east, north twelve degrees and forty minutes west, three hundred and ninety-eight feet to said iron post, the place of beginning; said lot No. 86 extending one thousand three hundred and sixteen and seven-tenths feet in length, along said Silva quartz vein or lode, and containing seven acres and twenty-two-hundredths of an acre of land, more or less.

"'Now know ye, that there is therefore hereby granted by the United States unto the said Kennedy Mining and Milling Company and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Silva quartz vein, lode or ledge, and of all other veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 86 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of

64 possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No.

86, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

"'To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to its successors and assigns forever; subject nevertheless to the above mentioned, and to the following conditions and stipulations:

"'First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

"'Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

65 "'Third. That in the absence of necessary legislation by Congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

"'In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"'Given under my hand at the city of Washington the sixth day of February in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

"'By the President:

"'BENJAMIN HARRISON.

"'By E. MACFARLAND,

"' *Ass't Secretary.*

"'[Seal of the U. S. Gen. L. O.]

"'D. P. ROBERTS,

"' *Recorder of the Gen. Land Office.*

"'Recorded vol. 234, pages 57 to 60 inclusive.'

"It is now stipulated and agreed that this cause be forthwith submitted to the court upon the foregoing agreed statement of facts and stipulations together with the facts established by the pleadings,

for its decision upon the respective rights of the parties and for judgment accordingly.

"Nothing herein shall be construed to deprive either party of the right to appeal or sue out a writ of error to the appropriate tribunal having jurisdiction for the purpose of reviewing any judgment which may be entered pursuant to decision rendered as con-
66 templated in this stipulation, but the right to have said judgment reviewed by the appellate courts by appropriate proceedings in that behalf is expressly reserved by both parties.

"Dated, September 13th, 1898.

"LINDLEY & EICKHOFF,
"W. J. McGEE,
"F. J. SOLINSKY,
"*Attorneys for Plaintiff.*
"JOHN M. WRIGHT,
"BYRON WATERS,
"JOHN J. SNYDER,
"*Attorneys for Defendant.*

"(Endorsed:) Formerly No. 1408 in the superior court of Amador county. In the superior court of Calaveras county, State of California. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining & Milling Company, defendant. Agreed statement of facts. Filed Sept. 14, 1898. A. L. Wyllie, clerk, by W. S. Coulter, deputy."

(Here follows map marked page 66*a*.)

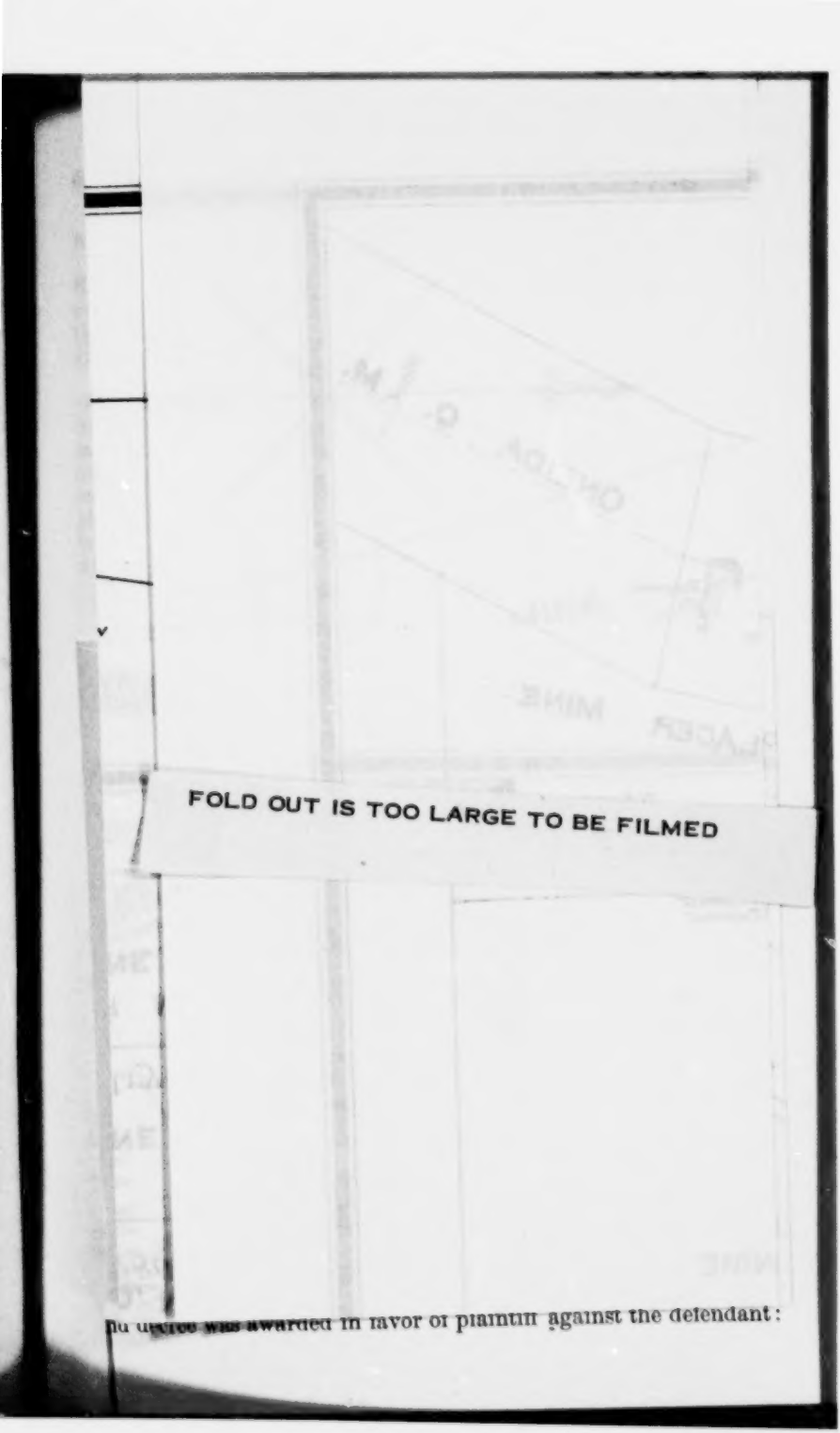
67 As to conclusions of law from said agreed statement of facts, the court finds:

I.

That the plaintiff, Argonaut Mining Company, is and at all times mentioned in the complaint was the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had, and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine.

II.

That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful.



No decree was awarded in favor of plaintiff against the defendant:

and the extraction of ore therefrom as set forth in said agreement of facts, was wrongful and unlawful.

68 III.

That the plaintiff is entitled to judgment and decree of this court, as follows:

(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold together with interest thereon from September 14th, 1898, at the rate of seven per cent. per annum, also costs of suit.

(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its own direction eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to be run or extended thereon any drifts, levels, stopes or mining works of any kind.

Let the judgment be entered accordingly.

Dated March 27th, 1899.

G. W. NICOL,
Presiding Judge.

(Endorsement:) No. 1408. State of California, county of
69 Calaveras. In the superior court. Argonaut Mining Company (a corporation), plaintiff, *vs.* Kennedy Mining & Milling Company (a corporation), defendant. Decision. Filed March 29, 1899. J. S. Jack, clerk.

Judgment.

In the Superior Court of Calaveras County, State of California.

ARGONAUT MINING COMPANY, Plaintiff, *vs.* KENNEDY MINING AND MILLING COMPANY, Defendant.	Formerly No. 1408 in the Superior Court of Amador County.

Judgment.

This cause came on regularly for trial on September 14th, 1898; Messrs. Lindley & Eickhoff, W. J. McGee and F. J. Solinsky appeared for plaintiff, and Messrs. John M. Wright, Byron Waters and John J. Snyder appeared for the defendant.

70 Thereupon said cause was submitted to the court for its decision upon an agreed statement of facts in writing pursuant to a stipulation in writing signed in that behalf by counsel for the respective parties.

And the court, having made its decision and conclusions of law in writing, which are now on file in this cause, wherein judgment and decree was awarded in favor of plaintiff against the defendant:

It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit taxed at $260.00.

It is further ordered, adjudged and decreed that the defendant, Kennedy Mining and Milling Company, its agents, servants, attorneys and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly, and from extracting or removing from any portion of said vein so lying between said vertical planes, any ore, rock or other material,
71 and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit, the north end line being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof.

Dated this 27th day of March, 1899.

G. W. NICOL,
Judge Presiding.

(Endorsed:) Formerly No. 1408, Amador county. In the superior court of Calaveras county, State of California. Argonaut Mining Company, plaintiff, *v.* Kennedy Mining and Milling Co., defendant. Judgment. Filed March 29, 1899. J. S. Jack, clerk.

72 *Certificate to Judgment-roll.*

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

We, the undersigned, attorneys for the above-named plaintiff and defendant respectively, do hereby certify the above and foregoing to be a true and correct transcript of the following-named papers filed in the above-entitled action, to wit, the complaint, the answer, the stipulation for entry of order changing place of trial, the order transferring the cause to Calaveras county for trial, the decision of the court and the judgment, said judgment being as entered and recorded in said action at page 167 of Judgment Book No. 3 of the superior court of Calaveras county, California.

And we further certify that said papers constitute the judgment-roll in said action.

Dated the 11th day of August, 1899.

LINDLEY & EICKHOFF,
WILLIAM J. McGEE,
F. J. SOLINSKY,
Attorneys for Plaintiff.
JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant.

73 *Notice of Appeal.*

In the Superior Court of the County of Calaveras, State of California.

ARGONAUT MINING COMPANY, Plaintiff, *vs.* KENNEDY MINING AND MILLING COMPANY, Defendant.	Cause No. 1408. Notice of Appeal.

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of California, from the final judgment therein given, made and entered in the said superior court, on the 29th day of March, 1899, in favor of the plaintiff in said action, and against said defendant, and from the whole of said judgment.

Yours, &c.,

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for said Defendant.

74 To the clerk of said superior court, and to Lindley & Eickhoff, W. J. McGee, and F. J. Solinsky, Esqrs., attorneys for plaintiff.

Dated this seventeenth day of May, A. D. 1899.

(Endorsed:) Service and receipt of a notice similar to the within notice of appeal is hereby admitted this seventeenth day of May, 1899. Lindley & Eickhoff, W. J. McGee, and F. J. Solinsky, attorneys for plaintiff.

(Endorsed:) No. 1408. Superior court, county of Calaveras. Argonaut Mining Company, plaintiff, *v.* Kennedy Mining and Milling Company, defendant. Notice of appeal. Filed May 19, 1899. J. S. Jack, clerk, by —— ——, deputy clerk. John M. Wright and Byron Waters, attorneys for defendant.

75 *Undertaking for Costs and Damages on Appeal.*

In the Superior Court of the County of Calaveras, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant.
} No. 1408. Undertaking for Costs and Damages on Appeal.

Whereas, the defendant in the above-entitled action is about to appeal to the supreme court of the State of California, from a final judgment entered against it in said action in said superior court in favor of the plaintiff in said action, on the 29th day of March, 1899, for fifty-eight thousand two hundred and thirty-nine and $\frac{85}{100}$ dollars and two hundred and sixty dollars costs of suit. (Said judgment also awarding to plaintiff a perpetual injunction against defendant, restraining defendant from mining any ore from within certain boundaries of the vein described in said judgment as the Pioneer or Argonaut vein):

Now, therefore, in consideration of the premises, and of
76 such appeal, we, the undersigned, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

C. S. BENEDICT. [SEAL.]
GEORGE GOODMAN. [SEAL.]

Dated this twentieth day of May, 1899.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

C. S. Benedict and Geo. Goodman, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself, says: That he is a resident and freeholder within said State of California, and is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. S. BENEDICT.
GEORGE GOODMAN.

Subscribed and sworn to before me this 20th day of May, 1899.

[Notarial Seal of Geo. T. Knox.]

GEO. T. KNOX,
Notary Public in and for the City and County of San Francisco, State of California.

77 (Endorsed:) No. 1408. Superior court, county of Calaveras. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling Company, defendant. Appeal. Undertaking for costs and damages. Filed May 22, 1899. J. S. Jack, clerk, by —— ——, deputy clerk.

Bill of Exceptions.

In the Superior Court of the County of Calaveras and State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

Be it remembered: That on the 14th day of September, 1898, this cause came on for trial before Honorable G. W. Nicol, judge of the superior court of the county of Tuolumne in said State, sitting in and for said county of Calaveras at the request of Honorable
78 C. V. Gottschalk, judge of the superior court of said county of Calaveras, upon:

First. The complaint of the plaintiff;

Second. The answer of the defendant;

Third. The agreed statement of facts and stipulation submitting cause;

Fourth. Stipulation extending time for filing objections; and

Fifth. Defendant's objections to certain facts in the said agreed statement;

All of which documents appear in the judgment-roll on file herein, except the fourth, to wit, the stipulation extending time for filing objections, and the fifth, to wit, defendant's objections to certain facts in the agreed statement, each of which is hereinafter set forth.

Said stipulation extending time for filing objections, signed by the respective attorneys for plaintiff and defendant, and filed herein, is in the words and figures following, to wit:

"In the Superior Court of the County of Calaveras, State of California.

"ARGONAUT MINING COMPANY, Plaintiff,
"*vs.*
"KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

79 "*Stipulation Extending Time for Filing Objections.*

"Whereas, by stipulation heretofore made herein, a certain statement of the facts in this case was agreed upon; and

"Whereas, in said stipulation it was provided that 'each or either party may serve on the opposite party and file in this cause within twenty days from this date' (Sept. 13th, 1898) 'a statement in writing setting forth specifically its objections to each fact the ad-

mission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled upon by the court the same as though made in open court or as though specifically set forth in this stipulation':

"Now it is hereby stipulated and agreed that the time for serving and filing such objections is hereby extended to and to include the 12th day of October, 1898.

"LINDLEY & EICKHOFF,
"W. J. McGEE, AND
"F. J. SOLINSKY,
"*Attorneys for Plaintiff.*
"JOHN M. WRIGHT,
"BYRON WATERS,
"JOHN J. SNYDER,
"*Attorneys for Defendant.*

"(Endorsement:) No. 1408. In the superior court of the
80 county of Calaveras, State of California. Argonaut Mining Co., plaintiff, *v.* Kennedy Mining and Milling Company, defendant. Stipulation extending time for filing objections. Filed October 4th, 1898. A. L. Wyllie, clerk."

That within the time allowed by the foregoing stipulation the defendant served upon plaintiff and filed herein defendant's objections to certain of the facts stated in the said agreed statement of facts, which objections as so served and filed were and are as follows, to wit:

"In the Superior Court of the County of Calaveras, State of California.

"ARGONAUT MINING COMPANY, Plaintiff,
vs.
"KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

"*Defendant's Objections.*

"Whereas, by stipulation heretofore made herein, a certain statement of the facts in this cause was agreed upon; and
"Whereas, in said stipulation it was provided that 'each or either party may serve on the opposite party and file in this cause within twenty days from this date' (Sept. 13th, 1898,) 'a statement
81 in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of

objections shall be deemed and taken as part of the record of the cause, and the objections therein stated shall be ruled upon by the court the same as though made in open court or as though specifically set forth in this stipulation.'

"Now in accordance with the right so stipulated and reserved, this defendant hereby specifically sets forth, makes and claims its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of those certain facts specified in said agreed statement as follows, to wit:

"First. All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;

"Second. All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy quartz mine, lot No. 44, and that a diagram of said mine was posted in the U. S. land office at Sacramento, California, on October 15, 1870;

82 "Third. All and singular each and every the facts stated in paragraph VII of said agreed statement, showing among other matters and things that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the register and receiver of the land office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

"Fourth. All and singular each and every the facts stated in paragraph VIII of said agreed statement, showing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. land office at Sacramento, California, said agreement being set forth *in hæc verba* in said paragraph VIII;

"Fifth. All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things that on March 15, 1871, the U. S. surveyor general for California instructed William L. McKim, a U. S. deputy mineral surveyor, to make patent survey of said Kennedy quartz mine;

"Sixth. All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy quartz mine during April and May, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on October 19,

83 1871, said surveyor general approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed.

"Defendant bases its aforesaid objections to the admission as evi-

dence herein of the facts aforesaid upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy quartz mine, lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

"(*c.*) All and singular each and every the facts so objected to, relate only to the surface area to be embraced within said Kennedy quartz mine, lot No. 44, and in nowise relate to any extra lateral right claimed as attaching to said Kennedy quartz mine, lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 44; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and the Pioneer quartz mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Kennedy quartz mine, nor was said agreement ever recorded in the office of the county recorder of the
84 county of Amador, State of California, in which said Kennedy quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to the Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

"(*e.*) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, are irrelevant and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva quartz mine, and without the vertical end boundaries of said Kennedy quartz mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva quartz mine, lot No. 86, which ownership is shown by the facts set forth in paragraph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva quartz mine was issued, to wit, under chapter six of title thirty-two of the Revised Statutes of the United States and legisla-
85 tion supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance

embraced within the area of said Silva quartz mine as described in said Silva patent; and

"(*f.*) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy quartz mine, lot No. 44.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Seventh. All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on June 29, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for said Kennedy quartz mine, lot No. 44, said patent being set forth *in hæc verba* in said paragraph XI;

"Eighth. All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such facts show or tend to show that on December 28, 1886, said Kennedy Mining Company conveyed to this defendant all the property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872.

"Defendant bases its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

86 "(*a.*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine, nor by showing the limitations of the patent to said Kennedy quartz mine; but plaintiff must rely upon and clearly show its own title to said ores; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva quartz mine, lot No. 86, and not by reason of its ownership of said Kennedy quartz mine, lot No. 44.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Ninth. All and singular each and every the facts set forth in paragraph XVII of said agreed statement, and the facts shown by the plat designated as 'Exhibit A' in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy quartz mine, lot No. 44;

"Tenth. All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such
87 facts show or tend to show the southern end line of said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the southern end line of said Kennedy quartz mine;

"Eleventh. All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy quartz mine, lot No. 44, and the nature and extent of said vein within said Kennedy quartz mine;

"Twelfth. All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in said Kennedy quartz mine, lot No. 44, and that said vein crosses out of said Kennedy quartz mine into said Pioneer quartz mine;

"Thirteenth. All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy quartz mine or the identity of such vein or any vein in said Kennedy mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B′ but within the vertical boundaries of said Silva quartz mine, lot No. 86;

"Fourteenth. All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy quartz mine on December 28, 1886, and ever since has been and now is such owner.

"And defendant bases its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in
88 said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer quartz mine, lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva quartz mine, lot No. 86, and not by reason of its ownership of Kennedy quartz mine, lot No. 44.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Fifteenth. All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer quartz mine, lot No. 48, and that a diagram of said Pioneer quartz
89 mine was posted in the U. S. land office at Sacramento, California, and on said Pioneer mine.

"Sixteenth. All and singular each and every the facts stated in paragraph VII of said agreed statement, showing among other mat-

ters and things, that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the register and receiver of the land office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

"Seventeenth. All and singular each and every the facts stated in paragraph VIII of said agreed statement, showing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. land office at Sacramento, California, said agreement being set forth *in hæc verba* in said paragraph VIII;

"Eighteenth. All and singular each and every the facts set forth in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. surveyor general for California instructed said William L. McKim to make patent survey of said Pioneer quartz mine;

"Nineteenth. All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent
90 survey of said Pioneer quartz mine on September 1, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on December 21st, 1871, said surveyor general approved said survey, the aforesaid return of such survey of said Pioneer quartz mine being set forth *in hæc verba* in said paragraph XIV of said agreed statement;

"Twentieth. All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things, that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer quartz mine as so surveyed by said William L. McKim, and that the receiver of said U. S. land office thereupon issued his duplicate receipt evidencing such entry and payment.

"Defendant bases its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer quartz mine, lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and
91 "(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said

Pioneer quartz mine, lot No. 48, and in nowise relate to any extra-lateral right claimed as attaching to said Pioneer quartz mine, lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 48; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and said Pioneer quartz mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Pioneer quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to said Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement.

"Defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said
92 Pioneer Gold and Silver Mining Company the Pioneer quartz mine, lot No. 48, as the same is described in said letters patent, a copy of which is set forth *in hæc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;

"Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed statement, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof.

"Defendant bases its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer quartz mine, lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: Although it is true that the ores in dispute herein were all extracted by defendant from the vein

mentioned in the complaint herein and in said agreed state-
93 ment and in said Pioneer patent as the 'Pioneer vein,' and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively. It is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly
94 being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said vertical east side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer

quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48 should or could attach
95 to said lot No. 48 and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

"(*b.*) All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer quartz mine, lot No. 48, and defendant specially sets up and claims that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant
96 more than nine hundred feet from said lot No. 48,—therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States' under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer quartz mine, lot No. 48, as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

"(*c.*) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(*d.*) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only 1,589.94 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1,589.94 linear feet
97 thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1,589.94 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that, even though the grant of 1,589.94 linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

"(*e.*) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein,
98 said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48, which is definable by reference to the boundaries of said lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1,450, 1,550, 1,650 and 1,750 levels south of a vertical plane drawn down through the north end line of said lot No. 48 extended indefinitely in its own direction north seventy-four (74) degrees and fifty-one (51)
99 minutes east, and that between October 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said Pioneer vien southerly from said vertical plane but within the vertical boundaries of said Silva quartz mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;

"Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'.

"Defendant bases its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: although it is true that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 throughout the entire length of said lot and midway between the side lines thereof to the center of the north end line
100 thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraphs XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No 48, are not parallel to each other,

but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends
101 downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by reference to said paragraph XXIII and to said 'Exhibit A,' all of said ores were extracted outside of and far easterly from said lot No. 48 and at points where vertical planes drawn down through the end lines of said lot No. 48 extended in their own directions respectively, are distant from each other more than 1,900 feet, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying
102 outside the vertical boundaries of said lot No. 48, should or could attach to said Pioneer quartz mine, and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an

extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and therefore said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, and therefore did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to said plaintiff; and

"(*b.*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said lot No. 48 and within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto,
103 and defendant specially sets up and claims that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said lot No. 86, and defendant further under said statutes and legislation of the United States, specially sets up and claims immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof, and defendant further specially sets up and claims immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48, and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48. Therefore, and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, en-
104 titled 'An act to promote the development of the mining resources of the United States,' under which the U. S. patent to said lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86, or any thereof; and

"(*c.*) All the ores in dispute herein were extracted by defendant

from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(*d.*) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1,589.94 linear feet of said Pioneer vein with the exclusive right to said 1,589.94 linear feet of said vein throughout its entire depth although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1,589.94 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1,589.94 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said
105 complaint whether it is the intention of plaintiff to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

"(*e.*) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said lot No. 48, such part so defined must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said complaint, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein,
106 parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48 which

is definable by reference to the boundaries of said lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint.

"And this defendant specially sets up and claims that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by plaintiff to the ores in question by reason of its ownership of the Pioneer quartz mine, lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva quartz mine, lot No. 86, is involved: First, the construction of the act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under the provisions of which plaintiff acquired its title to said lot No. 48; and, second, the construction of chapter six of title thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said lot No. 86.

107 "And all and singular each and every of such objections are so specially set up and claimed by defendant so as to apprise the court that the Federal questions so involved are presented for its consideration and decision.

"JOHN M. WRIGHT,
"BYRON WATERS,
"JOHN J. SNYDER,
"*Attorneys for Defendant.*

"(Endorsed:) No. 1408. In the superior court of the county of Calaveras, State of California. Argonaut Mining Company (a corporation), plaintiff, *vs.* Kennedy Mining and Milling Company (a corporation), defendant. Defendant's objections to certain facts in the agreed statement. Service of the within by delivery of a copy thereof admitted this 11th day of October, 1898. Lindley & Eickhoff, W. J. McGee, F. J. Solinsky, attorneys for plaintiff. Filed this 12th day of October, 1898. A. L. Wyllie, clerk, by W. S. Coulter, deputy clerk."

Whereupon, at the trial of this cause the following proceedings were had and the following exceptions reserved by defendant, namely: Prior to the submission of the cause to the court for its decision, defendant specially made, set up and claimed all and singular each and every the several objections stated and contained in the statement of objections hereinbefore set forth, so as to apprise the court that the Federal and other questions so raised and involved therein were presented for consideration and decision by the court; and all and singular each and every the said objections so

108 made as aforesaid, were by the court ruled upon in the manner hereinafter set forth, prior to the rendition of its decision upon the merits of the cause, by which said rulings of the court all

and singular each and every the said objections of defendant were overruled and denied, excepting those numbered third, fourth, sixteenth and seventeenth and such other of defendant's said objections as refer to the facts set forth in paragraphs seven (7) and eight (8) of said agreed statement of facts. And to all and singular each and every the said rulings of the court overruling and denying such objections aforesaid of the defendant, the defendant did duly except, and the action of the court in that behalf and the exceptions thereto of the defendant are here and now in this bill of exceptions made of record and set out seriatim as follows:

Objection and Exception No. 1.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"First. All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;"

which said objection was overruled by the court, to which
109 ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 1.

Objection and Exception No. 2.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Second. All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy quartz mine, lot No. 44, and that a diagram of said mine was posted in the U. S. land office at Sacramento, California, on October 15, 1870;"

which said objection was overruled by the court; to which ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 2.

5th Objection and Exception No. 3.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifth. All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things, that on March 15, 1871, the U. S. surveyor general for California instructed William L. McKim, a U. S. deputy
110 mineral surveyor, to make patent survey of said Kennedy quartz mine;"

which said objection was overruled by the court; to which ruling

the defendant did duly except and hereby makes the same of record as the defendant's exception No. 3.

6th Objection and Exception No. 4.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Sixth. All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy quartz mine during April and May, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on October 19, 1871, said surveyor general approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed."

Defendant based its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected
111 to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy quartz mine, lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

"(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Kennedy quartz mine, lot No. 44, and in nowise relate to any extra-lateral right claimed as attaching to said Kennedy quartz mine, lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 44; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and the Pioneer quartz mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Kennedy quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Kennedy quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to the Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

"(*e.*) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII,
VIII, IX and X of said agreed statement, are irrelevant
112 and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove

any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva quartz mine, and without the vertical end boundaries of said Kennedy quartz mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva quartz mine, lot No. 86, which ownership is shown by the facts set forth in paragraph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva quartz mine was issued, to wit, under chapter six of title thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance embraced within the area of said Silva quartz mine as described in said Silva patent; and

"(*f.*) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy quartz mine, lot No. 44."

Said 6th objection, excepting in so far as the same relates
113 to paragraphs seven (7) and eight (8) of said agreed statement, was overruled by the court, to which ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 4.

7th Objection and Exception No. 5.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Seventh. All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on July 29, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for said Kennedy quartz mine, lot No. 44, said patent being set forth *in hæc verba* in said paragraph XI;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 5.

8th Objection and Exception No. 6.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eighth. All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such
114 facts show or tend to show that on December 28, 1886, said Kennedy Mining Company conveyed to this defendant all the

property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872."

Defendant based its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine, nor by showing the limitations of the patent to said Kennedy quartz mine; but plaintiff must rely upon and clearly show its own title to said ores; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva quartz mine, lot No. 86, and not by reason of its ownership of said Kennedy quartz mine, lot No. 44."

Said eighth objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 6.

115 *9th Objection and Exception No. 7.*

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Ninth. All and singular each and every the facts set forth in paragraph XVII of said agreed statement, and the facts shown by the plat designated as 'Exhibit A' in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy quartz mine, lot No. 44;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 7.

10th Objection and Exception No. 8.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Tenth. All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such facts show or tend to show the southern end line of said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the southern end line of said Kennedy quartz mine;"

116 which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 8.

11th Objection and Exception No. 9.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eleventh. All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy quartz mine, lot No. 44, and the nature and extent of said vein within said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 9.

12th Objection and Exception No. 10.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twelfth. All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in
117 said Kennedy quartz mine, lot No. 44, and that said vein crosses out of said Kennedy quartz mine into said Pioneer quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 10.

13th Objection and Exception No. 11.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Thirteenth. All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy quartz mine or the identity of such vein or any vein in said Kennedy mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B′ but within the vertical boundaries of said Silva quartz mine, lot No. 86;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 11.

14th Objection and Exception No. 12.

At said trial the defendant specifically set forth, made and
118 claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fourteenth. All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy quartz mine on December 28, 1886, and every since has been and now is such owner.

And defendant based its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer quartz mine, lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva quartz mine, lot No. 86, and not by reason of its ownership of Kennedy quartz mine, lot No. 44."

119 Said 14th objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 12.

15th Objection and Exception No. 13.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifteenth. All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer quartz mine, lot No. 48, and that a diagram of said Pioneer quartz mine was posted in the U. S. land office at Sacramento, California, and on said Pioneer mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 13.

18th Objection and Exception No. 14.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"Eighteenth. All and singular each and every the facts set
120 forth in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. surveyor general for California instructed said William L. McKim to make patent survey of said Pioneer quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 16.

19th Objection and Exception No. 15.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Nineteenth. All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent survey of said Pioneer quartz mine on September 1, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on December 21, 1871, said surveyor general approved said survey, the aforesaid return of such survey of said Pioneer quartz mine being set forth *in hæc verba* in said paragraph XIV of said agreed statement;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 15.

121 *20th Objection and Exception No.* 16.

At said trial the defendant specifically set forth, made and claimed its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twentieth. All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer quartz mine as so surveyed by said William L. McKim, and that the receiver of said U. S. land office thereupon issued his duplicate receipt evidencing such entry and payment."

Defendant based its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to are

immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer quartz mine, lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and

122 "(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Pioneer quartz mine, lot No. 48, and in nowise relate to any extra-lateral right claimed as attaching to said Pioneer quartz mine, lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 48; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and said Pioneer quartz mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Pioneer quartz mine is situate, nor is it allaged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to said Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement."

Said twentieth objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 16.

21st Objection and Exception No. 17.

123 At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pioneer Gold and Silver Mining Company the Pioneer quartz mine, lot No. 48, as the same is described in said letters patent, a copy of which is set forth *in hæc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 17.

22nd Objection and Exception No. 18.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed statement, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof."

124 Defendant based its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer quartz mine, lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: Although it is true that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the 'Pioneer vein,' and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true

125 that as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89)

degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot
126 No. 48 and from said vertical east line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48 should or could attach to said lot No. 48 and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or inter-
127 est in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

"(*b.*) All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer quartz mine, lot No. 48, and defendant specially sets up and claims that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not paraliel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent

of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48,—therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States' under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of
128 said Pioneer vein which lies outside of the vertical boundaries of said Pioneer quartz mine, lot No. 48 as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

"(c.) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(d.) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only 1,589.94 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1,589.94 linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1,589.94 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and
129 next southerly from the north end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that, even though the grant of 1,589.94 linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

"(c.) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from
130 the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48, which is definable by reference to the boundaries of said lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent."

Said 22nd objection was overruled by the court, to which ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 18.

23*rd Objection and Exception No.* 19.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1,450, 1,550, 1,650 and 1,750 levels south of a vertical plane drawn down through the north end line of said lot No. 48 extended indefinitely in its own direction north seventy-four (74) degrees and fifty-one (51) minutes east, and that between October 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said
131 Pioneer vein southerly from said vertical plane, but within the vertical boundaries of said Silva quartz mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;"

which said objection was overruled by the court, to which the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 21.

24th Objection and Exception No. 20.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'."

Defendant based its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every
132 the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: Although it is true that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 throughout the entire length of said lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the ex-
133 tent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts seth forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed state-

ment, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by reference to said paragraph XXIII and to said 'Exhibit A' all of said ores were extracted outside of and far easterly from said lot No. 48 and at points where vertical planes drawn down through the end lines of said lot No. 48 extended in their own directions respectively, are distant from each other more than 1,900 feet, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and

134 more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, should or could attach to said Pioneer quartz mine, and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and therefore said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, and therefore did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to said plaintiff; and

135 "(*b.*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said lot No. 48 and within the vertical boundaries of defendant's silver quartz mine,

lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and defendant specially sets up and claims that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said lot No. 86, and defendant further under said statutes and legislation of the United States, specially sets up and claims immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof and defendant further specially sets up and claims immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each
136 other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48. Therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under which the U. S. patent to said lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86, or any thereof; and

"(c.) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(d.) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1,589.94 linear feet of said
137 Pioneer vein with the exclusive right to said 1,589.94 linear feet of said vein throughout its entire depth although

it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1,589.94 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1,589.94 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint whether it is the intention of plaintiff to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

"(*e.*) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said lot No. 48, such part so defined must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said com-
138 plaint, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48 which is definable by reference to the boundaries of said lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint."

Said 24th objection was overruled by the court; to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 20.

Exception No. 21.

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 1, as follows:

"That the plaintiff, Argonaut Mining Company, is and at
139 all times mentioned in the complaint was, the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine;"

and makes such exception of record herein as defendant's exception No. 21.

Exception No. 22

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 2, as follows:

"That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and the said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful;"

and makes such exception of record herein as defendant's exception No. 22.

140 *Exception No. 23.*

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 3, as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold, together with interest thereon from September 14th, 1898, at the rate of seven per cent. per annum, also costs of suit;"

and makes such exception of record herein as defendant's exception No. 23.

Defendant's Exception No. 24.

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its own di-

rection eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to
141 be run or extended thereon any drifts, levels, stopes or mining works of any kind;"

and makes such exception of record herein as defendant's exception No. 24.

Exception No. 25.

Defendant also excepts to that part of the judgment rendered herein, as follows:

"It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit, taxed at $260;"

and hereby makes such exception of record as defendant's exception No. 25.

Exception No. 26.

Defendant also excepts to that part of the judgment herein as follows:

"It is further ordered, adjudged and decreed that the defendant, Kennedy Mining and Milling Company, its agents, servants, attorneys and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly, and from extracting or removing from any portion of said vein
142 so lying between said vertical planes, any ore, rock or other material, and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit: the north end line, being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof;"

and hereby makes such exception of record herein as defendant's exception No. 27.

The foregoing draft of defendant's bill of exceptions is this third day of July, 1899, and within the time allowed therefor by order of the court and by stipulation of the parties, hereby presented and served upon plaintiff as being the defendant's bill of exceptions herein.

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant.

Endorsements.

Service of the within defendant's bill of exceptions on plaintiff and receipt of a copy thereof by plaintiff on this the third
143 day of July, 1899, is hereby acknowledged and admitted by plaintiff. Lindley & Eickhoff, W. J. McGee, Frank J. Solinsky, attorneys for plaintiff.

It is hereby stipulated and agreed that the within draft may be presented for settlement and allowance on or before July 20, 1899, and that the same may be settled and allowed by the judge who tried said cause as the defendant's bill of exceptions on appeal in said cause, dated July 10, 1899. Lindley & Eickhoff, W. J. McGee, and F. J. Solinsky, attorneys for plaintiff. John M. Wright, Byron Waters, attorneys for defendant.

The within bill of exceptions, having been agreed upon by the parties to the within-named action, by a written stipulation and agreement duly endorsed thereon, is hereby settled and allowed as defendant's bill of exceptions on appeal in said action, to wit, the action wherein Argonaut Mining Company is plaintiff and Kennedy Mining and Milling Company is defendant, and numbered as number 1408. Dated July 20, 1899. G. W. Nicol, judge, presiding.

No. 1408. In the superior court of the county of Calaveras, State of California. Argonaut Mining Company, plaintiff, *v.* Kennedy Mining and Milling Company, defendant. Defendant's bill of exceptions. Filed July 22, 1899. J. S. Jack, clerk.

144 *Attorneys' Certificate to Transcript.*

In the Superior Court of Calaveras County, State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

We, the undersigned attorneys for the above-named plaintiff and defendant respectively, do hereby certify the above and foregoing to be a true and correct transcript of the record in the above-entitled action, said transcript including a transcript of the following papers filed in said action, to wit, the complaint, the answer, the stipulation for entry of order changing place of trial, the order transferring the cause to Calaveras county for trial, the decision of the court, and the judgment (together constituting the judgment-roll), the de-
145 fendant's notice of appeal, the defendant's undertaking for costs and damages on appeal, and defendant's bill of exceptions.

And we further certify to the sufficiency of defendant's said undertaking for costs and damages on appeal.

Dated the 11th of August, A. D. 1899.

LINDLEY & EICKHOFF,
WM. J. McGEE,
F. J. SOLINSKY,
Attorneys for Plaintiff.
JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant.

146 Appeal from superior court of Calaveras county.—G. W. Nicol, judge.

For appellant, John M. Wright, Byron Waters.

For respondent, Lindley & Eickhoff, Wm. J. McGee and F. J. Solinsky.

Filed December 19, 1900.

In Bank.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff and Respondent,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant and Appellant.
} Sac. No. 733.

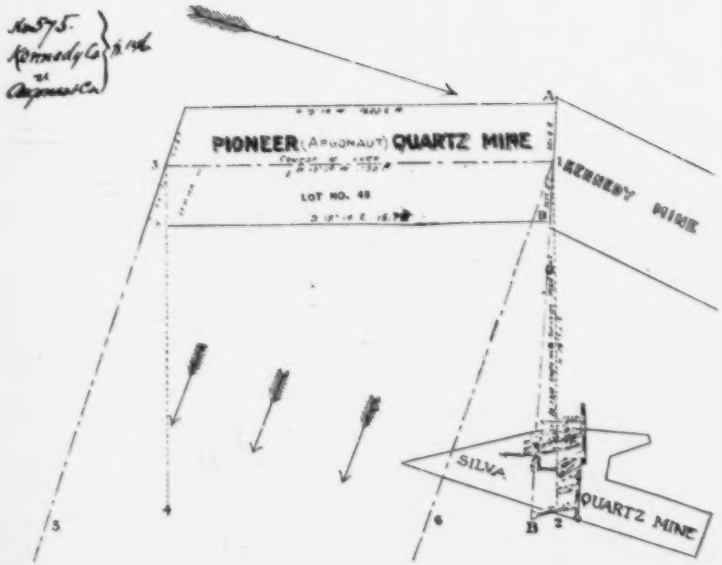
This is an action for damages for the value of ore alleged to have been taken by defendant from plaintiff's mine, situate in Amador county. The defendant denies taking any ore, or gold-bearing rock, from plaintiff's mine, and avers that defendant is the owner of the mine from which the rock was taken.

The cause was submitted in the trial court upon an agreed statement of facts, each party having the right to object to the relevancy, competency and materiality of any part of it. Certain objections to evidence were made by the appellant, which were overruled by the court, and the main argument here has been in regard to these rulings. Much of the evidence was objected to simply upon the ground of immateriality. All that I deem it necessary to say in regard to such rulings is that, admitting that the trial court erred as I am inclined to think it did, defendant has suffered no harm. The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence.

The controversy is indicated by the following diagram:

(Here follows diagram marked p. 146.)

The plaintiff owns the Pioneer quartz mine, the defendant owns the Kennedy mine and the Silva mine. All three mines had passed to patent before the ore was taken out by defendant. The ore was taken under the Silva location, and within its exterior limits carried vertically down. It was taken from the discovery lode of the Pio-


PIONEER (ARGONAUT) QUARTZ MINE
LOT NO. 48
LEZERBY MINE
SILVA
QUARTZ MINE
A
B
1
2
3
4
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neer location, which is the only lode which has its apex within that location. It enters that location near the middle point of the southern end line, and runs northerly through the location in a direction practically parallel to the side lines, through the center of the northern end line. In fact, save that the end lines are not parallel, the location and the lode are the ideals upon which the rules and regulations of miners and the laws of Congress seem to have been based.

The defendant does not assert any right to the ore in dispute by virtue of its ownership of the Kennedy mine, and nothing further need be said about it. Defendant asserts title to the ore by reason of its ownership of the Silva ground, under what counsel call the common-law right to everything beneath the surface. It admits plaintiff's ownership of the Pioneer mine, and that the lode has its apex, as stated, within its surface location, but denies that the quartz taken by it from that lode is within that location. This is asserted, as I understand the contention, upon two grounds: First, defendant contends that because of non-parallelism of the end lines of the Pioneer, it carries no extra-lateral rights; and, second, if the court can as matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel will be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The dip of the lode is easterly at an angle of about sixty degrees from the plane of horizon, and the end lines of the Pioneer diverge in that direction to the extent of about 14° 45′. The ore was taken out directly beneath the Silva surface location at depths varying from fourteen hundred to two thousand feet beneath the surface. The Silva location is more than nine hundred feet easterly from the easterly line of the Pioneer location.

The Pioneer was located, as the patent shows, under the law of 1866. The application for a patent was filed January 13, 1871. On the 23rd day of February, 1872, the Pioneer entered and paid for its mine, and the patent is dated August 12, 1872. The act to promote the development of the mining resources of the United States was passed May 10, 1872.

For reasons, which will appear as this opinion proceeds, I think plaintiff is entitled to all the rights which would attach to such a location under the law of 1866, and to any additional rights which inured to such locations under the act of 1872.

Among the contentions of the respondent is this: "Although the end lines were not required to be parallel under the act of 1866, yet if by any process of reasoning any limitation upon the extra-lateral right was imposed upon the locators' title by reason of the divergence of end lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations theretofore made
147 the right to pursue the vein on it- downward course, between the end-line plane of such location as it existed."

This proposition is based upon the language of the first proviso in section 3 of the law of 1872. After stating that the locators shall have certain lodes throughout their entire depth, although they may

so far depart from a perpendicular in their downward course as to extend outside the vertical side lines, it proceeds: "Provided that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." Then follows another proviso, that no locator by reason of his right to the dip of his lode shall be authorized to enter upon the surface of a claim owned by another.

These provisos grant no rights additional to those already given, nor do they purport to do so. They are both express limitations upon rights already given. The proviso does not confer ownership to all within those planes, but says, in effect, that no locator may pass beyond them. No rule of construction with which I am familiar would authorize or require a different reading of the section, especially in the face of the evident policy to strictly limit the rights of all locators as to length along the vein or lode.

We have many graphic accounts of the rush of gold-hunters to California in 1849. The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which any one could secure to himself any portion of the rich placers. In the absence of regulation, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily.

First, so far as possible, each person was given a specified portion of the ground which he could mine.

Secondly, the allotment to each was so limited that there should be no monopoly. So far as possible all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims.

And, thirdly, as a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him.

These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific coast, and in all attempts by legislation, territorial, State or national, to regulate mining locations. Indeed, it may be said that the purpose of all these laws and regulations is to secure these ends.

These views are, as I think, expressed by Judge Field in the celebrated Eureka case (4 Saw., 302). The locations there considered were made under the law of 1866, and one of the questions to be decided was whether the defendant was entitled to its allotted distance along the vein, although in its strike the vein passed beyond its exterior surface lines. There was no contention based upon diverging end lines, and there could not have been; for the ore body in dispute was within planes passing through the end lines of the

Champion location, which belonged to plaintiff, and was not within such planes passing through the end lines of any location under which defendant claimed. Defendant, on this point, simply contended that it had the oldest location, and under the law of 1866 had a right to the number of feet on the lode called for in its location, although it extended within the junior locations owned by plaintiff. It was held that defendant could not follow the lode on its strike through any line of its surface location. In reaching this conclusion the court emphasized the invariable and inexorable policy to limit the location along the course of the vein to the quantity located, and to the line of the surface location, and to permit an extension of right only on the dip.

Bearing, then, in mind that the argument was to show that under the law of 1866 the locator could not, for the purpose of securing his length of lode, pass the lines of his surface location, we may be instructed by the decision. It is first said the locations under the law of 1866 are not invalid because the end lines are not parallel. The law did not require such parallelism, and the requirement in the law of 1872 was merely directory and no consequence attached to a deviation from the direction. "Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations as the length of the lode."

The locator was limited to his number of feet on the lode throughout its entire depth, and the court realized that the only possible mode of so limiting the right was by parallel end lines. The miners seem to have regarded a lode as something like a plank. All a locator had to do was to measure off his distance upon it, and then make a "square cut" at the end. Judge Field's idea that the planes of the end "cuts" must be parallel in order to limit the locator at all depths to his number of feet claimed upon the surface is further shown. He says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

"Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been

adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the State were today to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant.

"The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein with its dips, angles and variations, to any depth, although it may enter land adjoining—that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended
148 solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or strike, as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he cannot pass."

Judge Field here was endeavoring to show that the locator was limited under the law of 1866 to the specified number of linear feet on the lode throughout its entire depth. The extent of his right could be measured by the feet on the surface. The statement that the requirement in the law of 1872, that the end lines shall be parallel was only directory, was overruled in Iron Silver M. Co. *vs.* Elgin Mining & Smelting Co., 118 U. S., 196, but that the limitation upon the line or distance on the lode continues throughout its entire depth has always been recognized. And, indeed, it seems obvious that the opposite contention could not be thought of. A proposed rule may be tested by inquiring what may be done with it. Suppose the divergence here had been one hundred and fifty degrees instead of fifteen, the dip being at a small angle from the plane of the horizon. The statutory limitation upon the length which could be taken on the lode would be a farce, even were the ledge the ideal ledge of miners. The Pioneer would soon have extended itself to the entire length of the lode.

I think the law of 1872, instead of extending the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2

provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location."

These words themselves, in my opinion, are sufficient to support the declaration of the court in the Eureka case. Speaking of the limitations provided in section 3 of the act of 1872, which I have noticed, of lodes to planes through the end lines, "The act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines."

This proposition is substantially reiterated in Iron Silver Mine *vs.* Elgin, 118 U. S., 194, and in many other cases, including the latest to which our attention has been called—Walrath *vs.* Champion, 171 U. S., 293.

It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode fifteen hundred and eighty-nine and $\frac{24}{100}$ linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth. * * * Provided that the right of possession to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added as a condition, "that the grant hereby made is restricted to the land hereinbefore described as lot No. forty-eight (48), with fifteen hundred and eighty-nine and $\frac{24}{100}$ linear feet of the Pioneer quartz vein, lode, ledge or deposit throughout its entire depth," etc.

I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion, that a patent to a location with end lines diverging in the direction of the strike does not convey all within those planes, but at the most not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extra-lateral rights at all. Such would be the law if the location were under the law of 1872, and as the patent to the Pioneer was issued after that law took effect counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extra-lateral rights. Another objection is that there is no description of the segment of the lode which extends beyond the surface location, and no grant can be effectual which does not define the thing granted.

Parallel end lines were not required in locations by the law of

1866, and yet extra-lateral rights were specifically given. The act refers to rules and regulations made by miners, but it is not said that any such rule required parallel end lines. It is claimed in argument that such was, in general, the custom of miners, but it is not even contended that there was such a custom in Amador county, and all the patents shown in this case lack such parallelism.

I think it would have been competent for Congress in the law of 1872 to have required parties who had equitable rights to patents to cause such adjustments of their surface lines as would indicate and define their extra-lateral rights—in other words, to have made their end lines parallel before a patent would issue, on pain of losing all extra-lateral rights. There are no such provisions in the act of 1872, but the rights of locators under former laws are expressly confirmed to them.

The presumption is very strong against forfeiture, and against such construction of any law as would work a forfeiture. The language of an act to have such effect must be very plain, or the court will, if possible, give a construction to it that would not have that effect.

It is admitted that such extra-lateral rights are recognized and asserted in the Eureka case, and I think in the language used by Judge Field in Iron S. & M. Co. *vs.* Elgin, 118 U. S., 196. The "Horse Shoe case" is equally clear upon this matter. "Under the act of 1866 (14 Statutes at Large, p. 251), parallelism in end lines of a surface location was not required, but where a location has been made since the act of 1872 such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines." This very clearly implies that a locator under the act of 1866 has such right, although his end lines are not parallel. In many other cases the same thing is implied. (Del Monte *vs.* Last Chance Co., 171 U. S., 55; Walrath *vs.* Champion, 63 Fed. Rep., 552; same case, 171 U. S., 293.)

We come, then, to the other phase of the question: Can it be determined as matter of law, from the patent or the complaint, what segment of the dip, if any, the plaintiff acquired by his location or patent? It is admitted, or rather contended, by counsel on both sides that the court cannot construct end lines. If the court is to adjudge that plaintiff is entitled to follow the dip beyond his lines, it must find some mode of limiting the right along the vein, and that limitation must result as matter of law from the patent, when the necessary facts are shown as to the property it attempts to convey—that is, as to the course and dip of the lode.

The contention of the parties in regard to this matter is shown upon the diagram. Of course it is understood that plaintiff contends for all included between planes drawn through its end
149 lines, although they diverge and would inevitably extend his rights along the strike. While defendant contends that because of such divergence plaintiff has no extra-lateral rights. But each party has an alternative theory, in case its primary contention is not sustained. Plaintiff says, if planes through its end lines do

not control, then planes are indicated between lines perpendicular to the general course of the lode.

Defendant's alternative is that, as the southern end line constitutes the initial line in the survey, it necessarily follows from the requirement of parallel end planes that the northern end line shall be parallel to it. That by locating and fixing the southern end line first the northern end line was thereby also definitely and finally located. These theories are shown in the diagram: 3–5 is the southern end line continued; 1–6 is a parallel line from the northern end of the lode. This shows defendant's theory. These lines would give the ore in dispute to defendant.

The lines suggested by plaintiff are 1–2 and 3–4. These are at right angles to the general course of the lode, and planes descending through them would give the ore to plaintiff. The line B–B′ is the northern end line continued, and between that line and 3–5 is plaintiff's first contention, which we have considered.

I am not referred to any authorities which support the contention of appellant that the southern end line must be considered as the basis from which the surface form of the location was projected. As stated, the argument is that having been first located it followed, as matter of law, that the other end line must be in the same direction in order that end lines may parallel. But the location was made, surveyed, the land paid for, and application made for the patent before the law of 1872 was enacted. The act of 1866 did not require parallel end lines to insure extra-lateral rights, or at all. There was, therefore, no implication that the second end line should be parallel to that first established. It was not an absolute necessity that by a naked description one end line should be described before the other. A side having been located, one sentence could have created both end lines from each end and at right angles to the side line in a certain direction. No such general rule, therefore, applicable to all cases could be adopted. Planes so constructed could not result as matter of law.

Planes through the lode at the end lines of the location at right angles to the general course would impose the required limitation upon the rights of the locator along the lode. The rule that they must be so constructed would be universally applicable—at least theoretically. The congressional system for the sale of mineral lands is founded upon the proposition that the course of the lode can be traced. That nature, in her infinite variety, does not always so deposit her mineral gifts is unfortunate; but I think in construing the law we may have regard to the views of the law-makers in regard to this subject, however crude and inadequate such views were. The law of 1866 is said to have been but a crystal-ization of the rules and customs of the miners. The first lodes worked were, I think, nearly in a uniform direction. The individual claims were short, usually two hundred feet. Under such circumstances it was not difficult to appropriate to each his number of feet on the dip at any depth. In California mines such claims were very often consolidated and disputes avoided. Often, as on the Comstock lode, the miners agreed upon a base line from which the surface form of lo-

cations were projected, or to which they were adjusted. This would result in parallel end lines.

The general practice, I think, was to have their claims bounded, so far as the lode was concerned, by parallel end lines, whatever might be the form of their surface location. In fact, they adopted the idea put forth by Judge Field in the Eureka case. Their rights on the lode were limited to planes at the limit of their right to the lode on the surface, at right angles to the general course of the lode.

The Eureka case is perhaps the only express authority for this proposition, but I do not find, as claimed by the learned counsel for the appellant, that it has been repudiated by later cases. On the contrary, these cases which imply extra-lateral rights when the end lines are not parallel seem to concede this rule. I am unable to understand Walrath *vs.* Champion, 171 U. S., 293, upon any other theory. There was liberty of surface form under the act of 1866, but the law strictly confined the right on the vein bellow the surface. This accords both with the Eureka case and the Flagstaff case. In the latter case it was said: "But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." But rights on the strike were limited by the surface lines of the location under both laws. Judge Field was familiar with the mining customs and laws. I have no doubt he expressed in the Eureka case what had been and was the universal understanding and practice of miners. The rule there declared seems to me reasonable, and, in fact, the only one that can be applied to such patents issued under locations made before the law of 1872 came into existence. If, as suggested, the officers of the land office usually adjust and make the end lines of locations parallel before issuing the patent, such patents, when issued, will be conclusive evidence that such also was the location.

A case has been cited in which the end lines of the location converge in the direction of the dip. (Carson City, etc., *vs.* North Star, 73 Fed. Rep., 597.) It was held that the locator had extra-lateral rights because the conveyance would give less rather than more on the dip of the vein. This may be all right, as it seems to me, however, not because the patent carries less rather than more than would pass had the end lines been parallel, but because that which is granted is described so that it can be definitely located. Under the force of the restriction contained in section 3 of the law of 1872, the locator could not take beyond planes through his end lines. This confined him within well-defined boundaries to less on the dip below the surface than he had upon the surface. If this was an attempt to construe the act of 1872, the logic might be questioned. That act, as construed, does not grant extra-lateral rights, because the end lines are parallel or converge towards the dip of the vein, but if they are parallel. The location there under consideration was made under the act of 1866, and carries extra-lateral rights because the extent of such rights *are* definitely described. At least such was the fact, and no other reason was required. It was, there-

fore, not necessary in that case to consider the point here under debate.

If this position be correct the complaint does definitely describe the segment of the lode from which the ore was taken.

The judgment is affirmed.

TEMPLE, *J.*

We concur.
McFARLAND, *J.*
GAROUTTE, *J.*
HENSHAW, *J.*
HARRISON, *J.*
BEATTY, *C. J.*

150 *Copy from Judgment-roll.*

Supreme Court, State of California.

Bank Minutes.

WEDNESDAY, *December 19th*, 1900.

* * * * * * *

ARGONAUT MINING COMPANY
vs.
KENNEDY MINING AND MILLING COMPANY. } Sac. 733.

The judgment is affirmed.

TEMPLE, *J.*

We concur.
McFARLAND, *J.*
GAROUTTE, *J.*
HARRISON, *J.*
BEATTY, *C. J.*

151 In the Supreme Court of the State of California.

KENNEDY MINING AND MILLING COMPANY, a Corporation, Defendant and Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY, a Corporation, Plaintiff and Defendant in Error.

Assignment of Errors.

Kennedy Mining and Milling Company, having petitioned the above-named court for an order permitting it to prosecute a writ of error to the honorable the Supreme Court of the United States from the final judgment made and entered in said cause by the supreme court of the State of California, now makes and files with its said petition the following, and specifies the same as its assignment of errors herein, upon which it will rely for a reversal of said judgment upon said writ:

(In each of the instances in which in the following assignments of error mention is made of an "agreed statement" it is hereby intended to designate the agreed statement of facts upon which the judgment herein is based, as set forth in the record.)

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"First. All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;"

which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 1.

152 The ruling of the superior court upon said objection (exception No. 1) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

II.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Second. All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy quartz mine, lot No. 44, and that a diagram of said mine was posted in the U. S. land office at Sacramento, California, on October 15, 1870;"

which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 2.

The ruling of the superior court upon said objection (exception No. 2) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error *upon which plaintiff in error* will rely for a reversal of the decision and judgment herein.

III.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifth. All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things, that on March 15, 1871, the U. S. surveyor general for California instructed William L. McKim, a U. S. deputy

153 mineral surveyor, to make patent survey of said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 3.

The ruling of the superior court upon said objection (exception No. 3) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

IV.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Sixth. All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy quartz mine during April and May, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on October 19, 1871, said surveyor general approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed."

Defendant based its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy quartz mine, lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

154 "(*c.*) All and singular each and every the facts so objected to, relate only to the surface area to be embraced within said Kennedy quartz mine, lot No. 44, and in nowise relate to any extralateral right claimed as attaching to said Kennedy quartz mine, lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 44; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and the Pioneer quartz mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Kennedy quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Kennedy quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to the Silva quartz mine, lot No.

86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

"(*e.*) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII, VIII, IX, and X of said agreed statement, are irrelevant and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva quartz mine, and without the vertical end boundaries of said Kennedy quartz mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva quartz mine, lot No. 86, which ownership is shown by the facts set forth in paragraph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva quartz mine was issued, to wit, under chapter six of title thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance embraced within the area of said Silva quartz mine as described in said Silva patent; and

"(*f.*) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy quartz mine, lot No. 44."

155 Said 6th objection excepting in so far as the same relates to paragraphs seven (7) and eight (8) of said agreed statement, was overruled by the court; to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 4.

The ruling of the superior court upon said objection (exception No. 4) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

V.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Seventh. All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on July 29, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for said Kennedy quartz mine, lot No. 44, said patent being set forth *in hæc verba* in said paragraph XI;"

which said objection was overruled by the court; to which ruling

the defendant did duly except, and made the same of record as the defendant's exception No. 5.

The ruling of the superior court upon said objection (exception No. 5) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

156 VI.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eighth. All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such facts show or tend to show that on December 28, 1886, said Kennedy Mining Company conveyed to this defendant all the property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872."

Defendant based its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine, nor by showing the limitations of the patent to said Kennedy quartz mine; but plaintiff must rely upon and clearly show its own title to said ores; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva quartz mine, lot No. 86, and not by reason of its ownership of said Kennedy quartz mine, lot No. 44."

Said eighth objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 6.

The ruling of the superior court upon said objection (exception No. 6) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

157 VII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Ninth. All and singular each and every the facts set forth in

paragraph XVII of said agreed statement, and the facts shown by the plat designated as 'Exhibit A' in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy quartz mine, lot No. 44;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 7.

The ruling of the superior court upon said objection (exception No. 7) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

VIII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Tenth. All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such facts show or tend to show the southern end line of said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the southern end line of said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 8.

The ruling of the superior court upon said objection (exception No. 8) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

158 IX.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eleventh. All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy quartz mine, lot No. 44, and the nature and extent of said vein within said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 9.

The ruling of the superior court upon said objection (exception No. 9) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

X.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twelfth. All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in said Kennedy quartz mine, lot No. 44, and that said vein crosses out of said Kennedy quartz mine into said Pioneer quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 10.

The ruling of the superior court upon said objection (exception No. 10) and the affirmance of such ruling by the supreme
159 court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XI.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Thirteenth. All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy quartz mine or the identity of such vein or any vein in said Kennedy mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B′ but within the vertical boundaries of said Silva quartz mine, lot No. 86;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 11.

The ruling of the superior court upon said objection (exception No. 11) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fourteenth. All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy quartz mine on December 28, 1886, and ever*y* since has been and now is such owner.

"And defendant based its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs

XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to wit:

160 "(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer quartz mine, lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva quartz mine, lot No. 86, and not by reason of its ownership of Kennedy quartz mine, lot No. 44."

Said 14th objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 12.

The ruling of the superior court upon said objection (exception No. 12) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XIII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifteenth. All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer quartz mine, lot No. 48, and that a diagram of said Pioneer quartz mine was posted in the U. S. land office at Sacramento, California, and on said Pioneer mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 13.

161 The ruling of the superior court upon said objection (exception No. 13) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XIV.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"Eighteenth. All and singular each and every the facts set forth

in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. surveyor general for California instructed said William L. McKim to make patent survey of said Pioneer quartz mine;"

which said objection was overruled by the court; to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 16 (14)[2].

The ruling of the superior court upon said objection (exception No. 16 (14)[2] and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XV.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Nineteenth. All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent survey of said Pioneer quartz mine on September 1, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on December 21, 1871, said surveyor general approved said survey, the aforesaid return of such survey of said Pioneer quartz mine being set forth *in hæc verba* in said paragraph XIV of said agreed statement;"

162 which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 15.

The ruling of the superior court upon said objection (exception No. 15) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XVI.

At said trial the defendant specifically set forth, made and claimed its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twentieth. All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer quartz mine as so surveyed by said William L. McKim, and that the receiver of said U. S. land office thereupon issued his duplicate receipt evidencing such entry and payment."

Defendant based its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to are

immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer quartz mine, lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and

163 "(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Pioneer quartz mine, lot No. 48, and in nowise relate to any extra-lateral right claimed as attaching to said Pioneer quartz mine, lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 48; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and said Pioneer quartz mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Pioneer quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to said Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement."

Said twentieth objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 16.

The ruling of the superior court upon said objection (exception No. 16) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XVII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pio-

164 neer Gold and Silver Mining Company the Pioneer quartz mine, lot No. 48, as the same is described in said letters patent, a copy of which is set forth *in hæc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 17.

The ruling of the superior court upon said objection (exception No. 17) and the affirmance of such ruling by the supreme court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XVIII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed statement, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof."

Defendant based its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer quartz mine, lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or
165 right in plaintiff to the ores in dispute in this cause, because:

Although it is true that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the 'Pioneer vein,' and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said

Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said vertical east side line thereof and
166 so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48 should or could attach to said lot No. 48 and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

"(*b.*) All the ores in dispute in this cause were extracted by de-

fendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer quartz mine, lot No. 48, and defendant specially sets up and claims that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to
167 follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48—therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States' under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer quartz mine, lot No. 48, as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

"(*c.*) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(*d.*) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only 1,589.94 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1,589.94 linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1,589.94 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1,589.94 linear feet of said Pioneer vein mid-

way between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that, even though the grant of 1,589.94 linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

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"(*e*.) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent, and by the complaint herein, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the centre of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48, which is definable by reference to the boundaries of said lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent."

Said 22nd objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 18.

The ruling of the superior court upon said objection (exception No. 18) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XIX.

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At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1,450, 1,550, 1,650 and 1,750 levels south of a vertical plane drawn down through the north end line of said lot No. 48 extended indefinitely in its own direction north seventy-four (74) degrees and fifty-one (51) minutes east, and that between October 8, 1895, and December 12, 1895,

this defendant extracted 2,604 tons of ore from said Pioneer vein southerly from said vertical plane but within the vertical boundaries of said Silva quartz mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;"

which said objection was overruled by the court, to which the defendant did duly except, and made the same of record as the defendant's exception No. (19).

The ruling of the superior court upon said objection (exception No. 19[a]) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XX.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'."

170 Defendant based its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: Although it is true that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 throughout the entire length of said lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent

and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof
171 into ground lying easterly from said lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by reference to said paragraph XXIII and to said 'Exhibit A' all of said ores were extracted outside of and far easterly from said lot No. 48 and at points where vertical planes drawn down through the end lines of said lot No. 48 extended in their own directions respectively, are distant from each other more than 1,900 feet, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, should or could attach to said Pioneer quartz mine, and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of

the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and therefore said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, and therefore did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to said plaintiff; and

172 "(*b.*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said lot No. 48 and within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and defendant specially sets up and claims that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said lot No. 86, and defendant further under said statutes and legislation of the United States specially sets up and claims immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof and defendant further specially sets up and claims immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48. Therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under which the U. S. patent to said lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86, or any thereof; and

173 "(c.) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(d.) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1,589.94 linear feet of said Pioneer vein with the exclusive right to said 1,589.94 linear feet of said vein throughout its entire depth, although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1,589.94 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1,589.94 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint whether it is the intention of plaintiff to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

"(e.) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said lot No. 48, such part so defined must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said complaint,
174 said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48 which is de-

finable by reference to the boundaries of said lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint."

Said 24th objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 20.

The ruling of the superior court upon said objection (exception No. 22) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXI.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 1, as follows:

"That the plaintiff, Argonaut Mining Company, is and at
175 all times mentioned in the complaint was the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine;"

and made such exception of record herein as defendant's exception No. 21.

The ruling of the superior court upon said matter (exception No. 21) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXII.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 2, as follows:

"That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and the said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful;"

and made such exception of record herein as defendant's exception No. 22.

The ruling of the superior court upon said matter (exception No. 22) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error

upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

176 XXIII.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 3, as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold, together with interest thereon from September 14th, 1898 at the rate of seven per cent. per annum, also costs of suit;"

and made such exception of record herein as defendant's exception No. 23.

The ruling of the superior court upon said matter (exception No. 23) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXIV.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its own direction eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to be run or extended thereon any drifts, levels, stopes or mining works of any kind;"

and made such exception of record herein as defendant's exception No. 24.

The ruling of the superior court upon said matter (exception No. 24) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

177 XXV.

Defendant also excepted to that part of the judgment rendered herein, as follows:

"It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-

eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit taxed at $260;"

and made such exception of record as defendant's exception No. 25.

The ruling of the superior court upon said matter (exception No. 25) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXVI.

Defendant also excepted to that part of the judgment herein as follows:

"It is further ordered, adjudged and decreed that the defendant Kennedy Mining and Milling Company, its agents, servants, attorneys, and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly,

178 and from extracting or removing from any portion of said vein so lying between said vertical planes, any ore, rock or other material, and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit: The north end line, being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof;"

and made such exception of record herein as defendant's exception No. 27.

The ruling of the superior court upon said matter (exception No. 26) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

That the superior court of the county of Calaveras, State of California, at the trial of said cause erred in each and every of its rulings and decisions upon each and every of the matters in these assignments of error respectively set forth, and the supreme court of the State of California, in its decision of the appeal of this plaintiff in error by affirming the said judgment and decision of said superior court, erred in so affirming the said rulings, decision, and judgment of said superior court in each and every of the particulars herein in this assignment of errors enumerated from 1 to 26, inclusive, thereof.

179 Wherefore, by reason of the foregoing assignment of errors and the petition of defendant, plaintiff in error herein, for leave to prosecute a writ of error herein to the Supreme Court of the United States, the plaintiff in error submits its said petition and these assignments of error and prays for an order of this honorable court; and said plaintiff in error further prays that upon the hearing of this cause by the said Supreme Court of the United States upon such writ of error all of the said judgment rendered herein by the superior court of the county of Calaveras, State of California, and the judgment of the said supreme court of the State of California affirming the same, may be by said Supreme Court of the United States reversed and set aside, and that upon said hearing of such writ of error such other and further order may be made in the premises as may be just.

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Plaintiff in Error.

180 [Endorsed:] Sac. 733. In the supreme court of the State of California. Kennedy Mining and Milling Company, a corporation, plaintiff in error, *vs.* Argonaut Mining Company, a corporation, defendant in error. Assignment of error. Filed January 14th, 1901. Geo. W. Root, clerk, by W. E. Boody, deputy.

181 In the Supreme Court of the State of California.

ARGONAUT MINING COMPANY, a Corporation, Defendant in Error,
vs.
KENNEDY MINING & MILLING COMPANY, a Corporation, Plaintiff in Error.

Petition for Allowance of Writ of Error.

To the honorable chief justice of the supreme court of the State of California:

Kennedy Mining and Milling Company, a corporation and plaintiff in error herein, most respectfully represents to your honor that it is the defendant and plaintiff in error in the proceeding and action hereinafter mentioned, and that Argonaut Mining Company, a corporation, is the plaintiff and defendant in error in said cause.

That said action was originally brought by complaint filed in the superior court of the State of California in and for the county of Amador on August 5th, 1897.

That on the 14th day of February, 1898, the defendant filed its answer therein.

That on April 13th, 1898, the attorneys for parties plaintiff and defendant to said action filed a written stipulation in said cause, by the terms of which it was agreed that because of the disqualification of the judge of the superior court of Amador county, State of California, an order might be made in said cause transferring the same

for trial to the superior court of Calaveras county, State of California.

That on the 13th day of April, 1898, an order was duly made and entered by the said superior court of the county of Amador reciting the disqualification of the judge of said court to try said cause and ordering that said cause be transferred to the superior court
182 of Calaveras county, State of California, for trial.

That thereafter and prior to September 14th, 1898, all of the record in said cause and said order transferring the same as aforesaid were duly certified to and filed in the office of the clerk of the superior court of the county of Calaveras, State of California.

That on the 14th day of September, 1898, said cause came on regularly for trial on the issues raised by said complaint and answer before the court, without a jury; and thereupon was made and entered into by the respective parties plaintiff and defendant to said suit an agreed statement of facts and stipulation submitting cause, by the terms of which all of the facts embraced within the issues made by the said complaint and answer in said cause were agreed upon, determined, and established for all of the purposes of the decision of said cause.

That by the terms of such agreed statement of facts it was expressly provided and reserved on the part of each, plaintiff and defendant, in said cause to the effect that the admission of such facts respectively as evidence in this cause shall be deemed and taken as duly objected to by the respective parties for want of relevancy and materiality to and competency to prove the issues presented by the pleadings, as fully for all purposes as though such objections were separately made and noted on the record in the customary legal manner.

183 And it is further stipulated and agreed that the admission of each of such facts as evidence and such objections thereto shall be ruled upon by the court at the time of the court's decision of the cause after final argument and submission.

Each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the court the same as though made in open court or as though specifically set forth in this stipulation.

And it is further stipulated and agreed that each of such rulings by the court upon the admission of such facts as evidence and upon such objections thereto, shall be deemed and taken as duly excepted to by the party against which such ruling shall be made, as fully for all purposes as though such exceptions were separately taken and noted on the record in the customary legal manner.

That upon and in pursuance of the right so to interpose such objections at said trial the defendant, on the 11th day of October, 1898,

and within the time stipulated by counsel for such purpose, served upon counsel for plaintiff defendant's objections to the admission or consideration by the court as evidence or as possessing probative force in said cause of certain of the facts specified in said agreed statement, and such objections in writing were filed of record in said cause on the 12th day of October, 1898.

That thereafter, but before rendering its decision upon said trial, the said superior court of the said county of Calaveras made its rulings upon all and each of such objections.

184 And on March 29th, 1899, the said superior court of the county of Calaveras rendered and entered its decision in said cause by adopting said agreed statement of facts as its finding of fact therein, together with its conclusions of law in writing appended thereto.

That said conclusions of law were to the following effect:

As to conclusions of law from said agreed statement of facts, the court find:

I.

That the plaintiff, Argonaut Mining Company, is and at all times mentioned in the complaint was, the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had, and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine.

II.

That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful.

III.

That the plaintiff is entitled to judgment and decree of this court as follows:

(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold, together

185 with interest thereon from September 14th, 1898, at the rate of seven per cent. per annum, also costs of suit.

(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its

own direction eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to be run or extended thereon any drifts, levels, stopes or mining works of any kind.

Let judgment be entered accordingly.

Dated March 27th, 1899.

That on the 29th day of March, 1899, the said superior court of Calaveras county, State of California, rendered and entered its judgment in said cause as follows, to wit:

This cause came on regularly for trial on September 14th, 1898. Messrs. Lindley & Eickhoff, W. J. McGee and F. J. Solinsky appeared for plaintiff, and Messrs. John M. Wright, Byron Waters, and John J. Snyder appeared for the defendant.

Thereupon said cause was submitted to the court for its decision upon an agreed statement of facts in writing pursuant to a stipulation in writing signed in that behalf by counsel for the respective parties.

And the court, having made its decision and conclusions of law in writing, which are now on file in this cause, wherein judgment and decree was awarded in favor of plaintiff against the defendant:

It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit taxed at $260.00.

It is further ordered, adjudged and decreed that the defendant, Kennedy Mining and Milling Company, its agents, servants,
186 attorneys and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly, and from extracting or removing from any portion of said vein so lying between said vertical planes, any ore, rock or other material, and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit, the north end line being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof.

Dated this 27th day of March, 1899.

G. W. NICOL,
Judge Presiding.

That upon the 3rd day of July, 1899, defendant, Kennedy Mining and Milling Company, caused to be served upon plaintiff, Argonaut

Mining Company, said defendant's bill of exceptions in said cause, in which are set out all and each of the exceptions reversed by the said defendant at the trial of said cause, together with exceptions reserved and taken to the conclusions of law as well as to the decision and judgment of the court rendered therein.

That such bill of exceptions was by the judge of said superior court duly settled and allowed and authenticated and filed in said cause on July 22nd, 1899.

That on the 17th day of May, 1899, defendant, Kennedy Mining and Milling Company, caused its notice of appeal in due form to be served upon the attorneys for plaintiff, Argonaut Mining Company, and to be duly filed in the office of the clerk of said superior court, by the terms of which notice was given that said defendant appealed to the supreme court of the State of California from the judgment in said cause rendered and entered therein by the said superior
187 court of the county of Calaveras.

That such appeal was perfected and the record thereof was duly filed in the office of the clerk of this court on the 28th day of August, 1899.

That on the perfecting of said appeal said defendant, Kennedy Mining and Milling Company, executed in due form and caused to be properly filed its undertaking on appeal in the sum of $300 conditioned for the payment of costs and damages that might be awarded to said plaintiff upon such appeal or dismissed thereof; and said defendant also, in order to procure a stay of execution pending such appeal, caused to be executed in due form and properly filed in the office of the clerk of the said superior court of said Calaveras county in said cause an undertaking on its behalf staying the execution of said judgment appealed from, in pursuance of the laws of the State of California in that behalf provided, which said undertaking staying execution was and is in the penal sum of $119,000.00 and in double the amount of said judgment, a copy of which said undertaking staying execution, duly certified by the custodian thereof, to wit, the clerk of the superior court of the county of Calaveras, is hereto appended, marked "Exhibit A," and made a part of this petition.

That said undertaking remains in full force and virtue, and by the terms and conditions thereof the said Argonaut Mining Company has secured unto it the full fruits of its said judgment in case the same or any part thereof shall be finally affirmed.

That the appeal of said defendant, Kennedy Mining and Milling Company, in said cause came on for hearing before this court at its May session, held at Sacramento, California, on May 8th, 1900.

188 That on December 19th, 1900, this the supreme court of the State of California rendered its decision of and upon said appeal, by the terms of which decision all of the said judgment of the said superior court was affirmed.

In said action and proceeding there was involved and drawn in dispute and question at the trial of said cause in said superior court of the county of Calaveras, State of California, as well as upon said

appeal so taken and heard in the supreme court of the State of California, the determination and decision of the title, right, privilege, and immunity claimed by this defendant under the statutes and laws of the United States—that is, under the provisions of chapter VI of title 32 of the Revised Statutes of the United States and legislation supplemental thereto and the act of Congress of the United States approved May 10th, 1872, entitled "An act to promote the development of the mining resources of the United States and acts amendatory thereof and supplemental thereto," and under the mining laws of the United States; which said titles, rights, privileges, and immunities so claimed by said defendant under said acts of Congress and under the mining laws of the United States were by said defendant, at the trial of the said cause in said superior court of the county of Calaveras and upon its said appeal before the said supreme court of the State of California, specially set up and claimed under the aforesaid statutes and legislation of the United States to the effect that this defendant at all the times mentioned in said complaint and answer has had and now has against all the world the exclusive title and right to all and singular each and every the 2,604 tons of ore in dispute in said cause and to all and singular each and every the substance contained within the vertical boundaries of defendant's Silva mine, lot No. 86, described in said agreed statement of facts, and that said defendant, under said statutes and legislation of the United States at each of said times in each
189 of said courts, specially set up and claimed immunity from all and every claim of said plaintiff to said 2,604 tons of ore and all thereof and from all and any claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof.

And said defendant further specially set up and claimed at the trial of said cause and upon its appeal immunity from and against the claim of plaintiff to said 2,604 tons of ore and the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, were not and are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen degrees and forty-five minutes, so that in order to reach said points where said ores were extracted, to wit, within the vertical boundaries of said lot No. 86, it is and was necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48, and into the area of defendant's mining ground embraced in said lot No. 86.

Therefore and because of the provisions of the act of Congress of the United States approved May 10th, 1872, entitled "An act to promote the development of the mining resources of the United States," under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now

and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86 or any thereof.

That the decision and judgment of the said superior court of the county of Calaveras, State of California, and as well the decision and judgment of the supreme court of the State of California, upon said appeal in said cause, were each and both decisions against the said title, right, privilege, and immunity so existing and specially set up and claimed by defendant, Kennedy Mining and Milling Company, under such laws of the United States hereinbefore specified, and the defendant and appellant in said action, Kennedy Mining and Milling Company, plaintiff in error herein, being dissatisfied with the judgment made and entered in said action and with the affirmance of the said judgment by said honorable court, and feeling itself aggrieved thereby and by the action of said court in awarding a judgment in favor of Argonaut Mining Company, plaintiff as aforesaid, and against plaintiff in error herein, and plaintiff in error claiming that under the agreed statement of facts herein judgment should have been in favor of defendant, the plaintiff in error, and that such judgment is contrary both to the law and the agreed facts, and that judgment in said cause should have been that plaintiff and defendant in error take nothing by its said action, and that defendant therein and plaintiff in error herein should have recovered judgment for its costs herein incurred.

For the proof of all of which statements herein made and for further particulars as to the questions and matters involved in said cause, reference is hereby made to the record of said cause on file in the office of the clerk of the supreme court of the State of California, and to the said certified copy of said undertaking on appeal staying execution, which is hereto appended and marked "Exhibit A," and all of said record and said certified copy of said undertaking on appeal are hereby made a part hereof.

Comes now aforesaid Kennedy Mining and Milling Company, plaintiff in error, by its attorneys, John M. Wright and Byron Waters, and petitions this honorable court for an order allowing said defendant, plaintiff in error, to prosecute a writ of error herein to the honorable Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided.

And also that an order be made fixing the amount of security which the plaintiff in error herein shall give upon said writ as required by the laws of the United States and by the rules of the Supreme Court of the United States, and in fixing the amount of such security so to be given by plaintiff in error the giving heretofore of the undertaking on appeal staying execution under the laws of the State of California, as hereinbefore specified, be taken into consideration, and that plaintiff in error be allowed the full benefit of said existing bond now in force securing defendant in error in the payment of the full amount of any judgment which may be

awarded to it by the affirmance of said judgment in whole or any part thereof.

And that such other and further order be made relative to said security to defendant in error as may be meet in the premises, to the end that the granting of the said writ of error and the making of said order as to such security and the compliance with the terms of said order by plaintiff in error shall operate as a supersedeas in said action, and that in the giving of such security all further proceedings in the superior court of the State of California in and
192 for the county of Calaveras and in the supreme court of the State of California be suspended and stayed until the determination of said cause upon said writ of error by the Supreme Court of the United States.

And your petitioner, as in duty bound, will ever pray, etc.

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant and Plaintiff in Error.

Writ of error allowed January 14th, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

193 (EXHIBIT "A.")

$1.49½, U. S. I. R. S., cancelled.

In the Superior — of the County of Calaveras, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant. } # 1408.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the State of California from a final judgment *and* entered in and by said superior court on the 29th day of March, 1899, against the defendant in said action and in favor of the plaintiff in said action for the sum of fifty-eight thousand two hundred thirty-seven $\frac{85}{100}$ (58,237.85) dollars and two hundred and sixty (260) dollars, costs of suit (said judgment also awarding to plaintiff a perpetual injunction against defendant, restraining defendant from mining any ore from within certain boundaries of the vein described in said judgment as the Pioneer or Argonaut vein):

Now, therefore, and in consideration of the premises and of such appeal, The United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, does hereby undertake and promise on the part of the appellant, to wit, the said Kennedy Mining and Milling Company, that the said appellant will pay all damages and costs which may be awarded against said Kennedy Mining and Milling Company, appellant, on

the appeal or on a dismissal thereof, not exceeding three hun-
194 dred (300) dollars, to which amount the said The United States Fidelity and Guaranty Company aforesaid acknowledges itself firmly bound;

And whereas the appellant, Kennedy Mining and Milling Company, is desirous of staying the execution of the said judgment so appealed from, the said The United States Fidelity and Guaranty Company does further, in consideration thereof and of the premises, acknowledge itself bound on the part of said appellant in the further sum of one hundred and nineteen thousand (119,000) dollars, being double the amount named in the said judgment, and does undertake, covenant, and promise on the part of said appellant that if said judgment appealed from or any part thereof be affirmed or the appeal be dismissed the appellant, Kennedy Mining and Milling Company, will pay to said Argonaut Mining Company the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant, Kennedy Mining and Milling Company, does not make such payment within thirty (30) days after the filing of the remittitur from the supreme court in the court from which the appeal is taken judgment may be entered, on motion of the respondent, in favor of said respondent, Argonaut Mining Company, and against said The United States Fidelity and Guaranty Company for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

Dated this twentieth day of May, 1899.

[Corporate Seal.]

THE UNITED STATES FIDELITY [SEAL.]
AND GUARANTY COMPANY,
By J. D. MAXWELL, *Its Attorney-in-fact.* [SEAL.]

195 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this twentieth day of May, A. D. one thousand eight hundred and ninety-nine, before me, O. A. Eggers, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared J. D. Maxwell, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of The United States Fidelity and Guaranty Company, and the said J. D. Maxwell acknowledged to me that he subscribed the name of The United States Fidelity & Guaranty Company thereto as principal and his own name as attorney-in-fact.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city and county of San Francisco, the day and year first above written.

[SEAL.] O. A. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed May 22, 1899. J. S. Jack, clerk.

STATE OF CALIFORNIA, } ss:
County of Calaveras, }

I, J. S. Jack, county clerk of the county of Calaveras, State of California, and clerk of the superior court, do hereby certify that I have compared the foregoing copy of the appeal bond of defendant in appealed cause, Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling Company, defendant, and of the endorsements thereupon, with the original records of the same remaining in this office, and that the same are correct transcripts therefrom and of the whole of said original records.

[SEAL.]

(10-c. Rev. St.)

In witness whereof I have hereunto set my hand and affixed the seal of said court this seventh day of January, 1901.

J. S. JACK,
County Clerk and ex Officio Clerk of said Superior Court of said County.

196 [Endorsed:] Sac., No. 733. In the supreme court of the State of California. Argonaut Mining Company (a cor.), defendant in error, *vs.* Kennedy Mining and Milling Company (a cor.), plaintiff in error. Petition for allowance of writ of error. Filed January 14th, 1901. Geo. W. Root, clerk, by W. E. Moody, deputy.

197 In the Supreme Court of the State of California.

KENNEDY MINING AND MILLING COMPANY, a Corporation, Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY, a Corporation, Defendant in Error.

Order Allowing Writ of Error.

Upon the petition of Kennedy Mining and Milling Company, plaintiff in error, for a writ of error herein and the accompanying assignments of error presented and filed therewith on this 14th day of January, 1901, on motion of John M. Wright and Byron Waters, of counsel for plaintiff in error, said Kennedy Mining and Milling Company—

It is ordered that a writ of error herein be, and is hereby, allowed, and in view of the fact that said Kennedy Mining and Milling Company has heretofore in this cause filed in the office of the clerk of the superior court of the county of Calaveras, California, an undertaking on appeal from the judgment of the said court rendered in this cause in double the amount of the judgment rendered by said superior court herein, securing to said Argonaut Mining Company the fruits of said judgment in case the same be finally affirmed, which said undertaking on appeal yet remains in full force and effect, and in consideration of said undertaking so securing said Argonaut Mining Company, and in view of the fact that thereby defendant in error, said Argonaut Mining Company, is fully protected by ample security for the payment of said judgment in case the same or any

part thereof be affirmed by the Supreme Court of the United States, it is further ordered that in order to stay execution of said
198 judgment pending the writ of error herein, plaintiff in error shall not be required to file any further or additional supersedeas bond, but that said undertaking shall stand as a supersedeas bond herein, and that said plaintiff in error, Kennedy Mining and Milling Company, is only required to give an additional bond for costs and just damages for delay herein, as required by law and the rules of the Supreme Court of the United States, in the penal sum of one thousand ($1,000.00) dollars, which said bond already given and said bond provided for by this order shall operate as a supersedeas bond, staying execution of the said judgment pending the writ of error aforesaid.

January 14th, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

199 [Endorsed:] Sac., 733. In the supreme court of the State of California. Kennedy Mining & Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Order allowing writ of error. Filed January 14th, 1901. Geo. W. Root, clerk, by A. W. Johnson, deputy.

200 In the Supreme Court of the State of California.

KENNEDY MINING AND MILLING COMPANY (a Corporation), Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY (a Corporation), Defendant in Error.

H. S., N. P. Know all men by these presents that we, Kennedy Mining and Milling Company, as principal, and Albert H. Reichling and George Goodman, as sureties, are held and firmly bound unto the People of the State of California in the full and just sum of one thousand (1,000) dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of January, 1901.

Whereas the action above entitled was originally brought in the superior court of the State of California in and for the county of Amador, on August 5th, 1897, and thereafter said cause was transferred for trial to the superior court of the county of Calaveras, in said State; and

Whereas on March 29th, 1899, said superior — of the county of Calaveras rendered and entered its decision in said action, and thereupon caused its final judgment in said action to be rendered and entered awarding to plaintiff, Argonaut Mining Company (defendant in error), a judgment therein against defendant, Kennedy Mining and Milling Company (plaintiff in error), for the sum of
201 fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ dollars ($58,237.85), together with costs of suit, taxed at two

hundred and sixty (260) dollars, but upon which said judgment plaintiff in error duly perfected an appeal to the supreme court of the State of California on the 28th day of August, 1899; and

Whereas, on the perfecting of said appeal, said defendant, Kennedy Mining and Milling Company, executed in due form and caused to be properly filed its undertaking on appeal in the sum of three hundred dollars ($300), conditioned for the payment of costs and damages that might be awarded to said plaintiff upon such appeal or dismissal thereof, and said defendant also, in order to procure a stay of execution pending such appeal, caused to be executed in due form and properly filed, in the office of the clerk of said superior court of said Calaveras county, in said cause an undertaking on its behalf staying the execution of said judgment appealed from, in pursuance of the laws of the State of California in that behalf provided, which said undertaking staying execution was and is in the penal sum of one hundred and nineteen thousand dollars ($119,000) and in double the amount of the said judgment, a copy of which said undertaking staying execution, duly certified by the custodian thereof, to wit, the clerk of the superior court of the county of Calaveras, State of California, is annexed unto the petition for writ of error herein, which said undertaking staying execution remains in full force and virtue, and by the terms and conditions thereof the said Argonaut Mining Company has secured unto it the full fruits of its said judgment in case the same or any part thereof shall be finally affirmed; and

Whereas by such appeal all of the said judgment in the
202 said superior court of the county of Calaveras, State of California, was by the said supreme court of the State of California in all respects affirmed; and

Whereas the petition of Kennedy Mining and Milling Company, plaintiff in error, was, on the 14th day of January, 1901, duly presented to the chief justice of the supreme court of the State of California, praying for the allowance of a writ of error to the *the* Supreme Court of the United States herein, and praying that upon such writ of error the said judgment shall be reversed by the Supreme Court of the United States; and

Whereas said petition has been allowed by the chief justice of the supreme court of the State of California, and an order at the same time of such allowance was made that said undertaking staying execution be allowed to stand as for a supersedeas bond herein, operating as a stay of execution of the said judgment until the final determination of said writ of error by the Supreme Court of the United States, upon plaintiff in error filing herein, duly executed, with proper sureties, its bond to and in favor of defendant in error, Argonaut Mining Company, in the sum of one thousand (1,000) dollars, conditioned as required by law:

Now, the condition of this obligation is such that if the said Kennedy Mining and Milling Company shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make

good its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

KENNEDY MINING AND MILLING COMPANY,
[SEAL.] By DANIEL E. HAYES, *Its President, and*
By E. C. HUTCHINSON, *Its Secretary.*
ALBERT H. REICHLING. [SEAL.]
GEORGE GOODMAN. [SEAL.]

[Five ten-c. rev. stamps.]

203 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

H. S., N. P. Albert H. Reichling and George Goodman, being duly and separately sworn, each for himself, and not one for the other, says:

I am one of the sureties upon the above undertaking and reside in the city and county of San Francisco, State of California, and am a householder therein. I am worth the sum of five thousand (5,000) dollars in property situate in said State of California over and above all my just debts and liabilities, exclusive of property exempt from execution.

ALBERT H. REICHLING.
GEORGE GOODMAN.

Subscribed and sworn to before me this 14th day of January, 1901.

HOLLAND SMITH,
[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

204 [Endorsed:] Sac., 733. In the supreme court of the State of California. Kennedy Mining and Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Bond on writ of error. 5. Filed January 14, 1901. Geo. W. Root, clerk, by W. E. Boody, deputy. The within bond is hereby approved. W. H. Beatty, chief justice of the supreme court of California. January 14, 1901.

205 KENNEDY MINING AND MILLING COMPANY, a Corporation, Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY, a Corporation, Defendant in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Argonaut Mining Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 15th day of March, 1901, pursuant to a writ of error filed in the clerk's office of the supreme

court of the State of California, wherein Kennedy Mining and Milling Company, a corporation, is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 14th day of January, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

206 [Endorsed:] Sac., 733. Kennedy Mining & Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Citation. Filed January 15th, 1901. Geo. W. Root, clerk, by W. E. Boody, deputy.

Service of the *written* citation and receipt of a copy of the writ of error mentioned therein acknowledged this 14th day of January, 1901.

LINDLEY & EICKHOFF,
W. J. McGEE,
F. J. SOLINSKY,
Attorneys for Argonaut Mining Company, Defendant in Error.

207 In the Supreme Court of the State of California.

ARGONAUT MINING Co. (a Corp.), Plain. and Resp.,
vs.
KENNEDY MINING AND MILLING Co. (a Corp.), Def. and App. } Sac., 733.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of writ of error, trans. on appeal, opinion, and judgment, assignment of error, petition for writ, order allowing writ, citation, and bond as shown by the records of my office, and that the same constitutes the writ of error in this case.

Witness my hand and the seal of the court this 13th day of February, A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk*,
By W. E. BOODY, *Deputy*.

[Ten-cent United States internal-revenue stamp, canceled Feb. 13, 1901.]

[Endorsed:] Sac., No. 733. In the supreme court, State of California. Kennedy Mining and Milling Company *vs.* Argonaut Mining Company.

Endorsed on cover: File No., 18,060. California supreme court. Term No., 575. The Kennedy Mining and Milling Company, plaintiff in error, *vs.* The Argonaut Mining Company. Filed February 23, 1901.